No. 05-848
Title: Environmental Defense, et al., Petitioners
v.
Duke Energy Corporation et al.
Docketed: January 5, 2006
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Nos.: (04-1763)
Decision Date: June 15, 2005
Rehearing Denied: August 30, 2005
Questions Presented

Date	Proceedings and Orders
Nov 15 2005	Application (05A441) to extend the time to file a petition for a writ of certiorari from November 28, 2005 to January 12, 2006, submitted to The Chief Justice.
Nov 17 2005	Response to application from respondent Duke Energy Corporation filed.
Nov 17 2005	Application (05A441) granted by The Chief Justice extending the time to file until December 28, 2005.
Dec 28 2005	Petition for a writ of certiorari filed. (Response due February 6, 2006)
Jan 31 2006	Order extending time to file response to petition to and including March 8, 2006, for all respondents.
Mar 7 2006	Brief amici curiae of New York, et al. filed.
Mar 8 2006	Brief of respondent United States in opposition filed.
Mar 8 2006	Brief of respondent Duke Energy Corporation in opposition filed.
Mar 8 2006	Brief amici curiae of National Parks Conservation Association, et al. filed.
Mar 21 2006	Reply of petitioners Environmental Defense, et al. filed. (Distributed)
Mar 22 2006	DISTRIBUTED for Conference of April 14, 2006.
Apr 17 2006	DISTRIBUTED for Conference of April 21, 2006.
Apr 24 2006	DISTRIBUTED for Conference of April 28, 2006.
May 8 2006	DISTRIBUTED for Conference of May 11, 2006.
May 15 2006	Petition GRANTED.
May 22 2006	Extension of time within which to file the joint appendix and petitioners' brief on the merits to and including July 21, 2006.
Jun 5 2006	Consent for the filing of amicus briefs in support of either/neither party received from counsel for the respondent.
Jun 5 2006	Extension of time within which to file the respondent's brief on the merits to and including September 15, 2006.
Jul 5 2006	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioners.
Jul 21 2006	Brief amici curiae of Chesapeake Bay Foundation and Adirondack Mountain Club filed.
Jul 21 2006	Brief amici curiae of STAPPA and ALAPCO
Jul 21 2006	Brief amici curiae of New Jersey, et al. filed.
Jul 21 2006	Brief of respondent United States in support filed.
Jul 21 2006	Joint appendix filed. (Joint appendix in two volumes).
Jul 21 2006	Brief of petitioners Environmental Defense, et al. filed.

Jul 21 2006	Brief amici curiae of Law Professors John E. Bonine, et al. filed.
Jul 21 2006	Brief amici curiae of New York, et al. filed.
Jul 21 2006	Brief amici curiae of American Lung Association, et al. filed.
Jul 21 2006	Brief amici curiae of National Parks Conservation Association, et al. filed.
Jul 21 2006	Brief amici curiae of Former EPA Administrators Carol M.Browner and Russell E. Train filed.
Jul 21 2006	Brief amici curiae of Current and Former Members of Congress Henry Waxman, et al. filed.
Aug 14 2006	SET FOR ARGUMENT on Wednesday, November 1, 2006.
Aug 14 2006	CIRCULATED.
Sep 15 2006	Brief amicus curiae of Manufacturers Aassociation Work Group filed. (Distributed)
Sep 15 2006	Motion of Alabama, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
Sep 15 2006	Brief of respondent Duke Energy Corporation filed. (Distributed)
Sep 15 2006	Brief amici curiae of Alabama, et al. filed. (Distributed)
Sep 15 2006	Brief amicus curiae of Electric Utility Industry filed. (Distributed)
Sep 15 2006	Brief amicus curiae of APA Watch filed. (Distributed)
Sep 15 2006	Brief amicus curiae of National Environmental Development Association filed. (Distributed)
Sep 15 2006	Brief amicus curiae of Walter C. Barber filed. (Distributed)
Sep 15 2006	Brief amicus curiae of U.S. Representative Joe L Barton filed. (Distributed)
Sep 15 2006	Brief amici curiae of International Brotherhood of Boilermakers, et al. filed. (Distributed)
Sep 15 2006	Brief amici curiae of American Public Power Association and National Rural Electric Cooperative Association filed. (Distributed)
Sep 15 2006	Brief amicus curiae of Washington Legal Foundation filed. (Distributed)
Sep 15 2006	Brief amici curiae of Law Professors filed. (Distributed)
Sep 18 2006	Motion for divided argument filed by the Solicitor General.
Sep 18 2006	Petitioners' response to motion of Alabama, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
Sep 22 2006	DISTRIBUTED for Conference of September 25, 2006.
Sep 28 2006	Record received from U.S.C.A. for 4th Circuit. (1 box)
Oct 2 2006	Motion of Alabama, et al. for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
Oct 2 2006	Motion for divided argument filed by the Solicitor General GRANTED.
Oct 10 2006	Record received from U.S.D.C. for Middle District of North Carolina (Greensboro) (6 boxes)
Oct 19 2006	Reply of petitioners Environmental Defense, et al. filed. (Distributed).
Oct 20 2006	Reply of United States as respondent supporting peittioners filed. (Distributed).
Oct 27 2006	Petitioner's proposed lodging approved and filed (20 copies each of the brief of Industry Petitioners, settlement agreement, and certified CA-4 transcript). DISTRIBUTED.
Nov 1 2006	Argued. For petitioners: Sean H. Donahue, Washington, D.C. For respondent United States in support of petitioners: Thomas G. Hungar, Deputy Solicitor General, Department of Justice, Washington, D.C. For respondent Duke Energy Corporation: Carter G. Phillips, Washington, D.C.

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No. 05-___

IN THE

Supreme Court of the United States

ENVIRONMENTAL DEFENSE, ET AL.,
Petitioners,

v.

DUKE ENERGY CORP., ET AL.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this civil enforcement action under the Clean Air Act, the Fourth Circuit ruled that EPA's definition, embodied in a 1980 regulation, of emissions "increases" for purposes of the Prevention of Significant Deterioration (PSD) program violates the Act because it differs from a regulatory definition EPA employs to measure emissions increases under another program under the Act, the New Source Performance Standards (NSPS). Both the court's holding and its analysis of the statute conflict with decisions of other courts, including a decision rendered by the D.C. Circuit rejecting challenges to the very regulations at issue in this case, *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005). The questions presented are:

1. Whether the Fourth Circuit's decision violated Section 307(b) of the Act, which provides that national Clean Air Act regulations are subject to challenge "only" in the D.C. Circuit by petition for review filed within 60 days of their promulgation, and "shall not be subject to judicial review" in enforcement proceedings, 42 U.S.C. 7607(b); and

2. Whether the Act's definition of "modification," which turns on whether there is an "increase" in emissions and which applies to both the NSPS and PSD programs, rendered unlawful EPA's longstanding regulatory test defining PSD "increases" by reference to actual, annual emissions.

PARTIES TO THE PROCEEDINGS

Plaintiff the United States, and plaintiffs-intervenors Environmental Defense, North Carolina Sierra Club, and North Carolina Public Interest Research Group Citizen Lobby/Education Fund were appellants in the court of appeals. Defendant Duke Energy Corporation was appellee in the court of appeals.

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OPINIONS BELOW

The opinion of the district court is reported at 278 F. Supp. 2d 619 and is reproduced in the Appendix ("App.") at page 22a. That court's order granting summary judgment is unreported and is reproduced at App. 85a. The court of appeals' order requesting supplemental briefing is reprinted at App. 21a, and its opinion is published at 411 F.3d 539 and reproduced at App. 1a. The court of appeals' unreported order denying rehearing en banc is reproduced at App. 20a.

JURISDICTION

The district court's jurisdiction was based upon 28 U.S.C. 1331. The court of appeals had appellate jurisdiction based on 28 U.S.C. 1291. The scope of both courts' jurisdiction was limited by 42 U.S.C. 7607(b).

The court of appeals entered judgment on June 15, 2005, and denied petitioners' and the United States' petitions for rehearing en banc on August 30, 2005. On November 17, 2005, the Chief Justice extended the time for petitioners to file a petition for certiorari to December 28, 2005. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Clean Air Act (CAA) defines a "modification" for purposes of the New Source Performance Standards (NSPS) and Prevention of Significant Deterioration (PSD) programs as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source[.]" 42 U.S.C. 7411(a), 7949(2)(C). Section 307(b), 42 U.S.C. 7607(b), provides that judicial review of "nationally applicable regulations" under the Act may be had "only" by petition for review in D.C. Circuit filed with 60 days of promulgation, and that such regulations and "any other final action" subject to such review "shall not be subject to judicial review" in enforcement proceedings. These and other relevant provisions

of the Act and its implementing regulations are reproduced at App. 96a-106a.

INTRODUCTION

In this Clean Air Act enforcement action, the Fourth Circuit set aside, as contrary to the statute, EPA's regulatory test, embodied in regulations adopted in 1980, defining an "increase" in emissions for purposes of the Act's PSD program. In so doing, the court contravened Section 307(b) of the Act, which expressly confines challenges to national CAA regulations to petitions for review filed in the D.C. Circuit within 60 days, and which expressly forbids such challenges in enforcement proceedings.

Nine days after the Fourth Circuit's decision, the D.C. Circuit denied petitions for review brought by an industry coalition (including respondent Duke Energy) challenging the very 1980 regulation that was held contrary to statute by the Fourth Circuit here. *New York v. Environmental Protection Agency*, 413 F.3d 3 (D.C. Cir. 2005). In that decision, the D.C. Circuit found that the industry petitioners had waived the statutory theory adopted by the Fourth Circuit here, and it rejected a related statute challenge that was made to the 1980 PSD regulations attacking EPA's emissions "increase" test as contrary to the statutory definition of modification. *New York* also held, contrary to the decision here, that the CAA's PSD provisions not only permit, but compel, an "actual emissions" test for PSD modifications. The Fourth Circuit's reading of the Act thus directly conflicts with that of the court whose exclusive jurisdiction it invaded.

The Fourth Circuit reasoned that EPA's "actual annual emissions" test for PSD emissions increases is unlawful because the CAA uses the same definition of "modification" for PSD and for the separate NSPS program, for which EPA has a different test of emissions "increases." The court based this decision on what it called an "effectively irrebuttable" presumption that identical *statutory* definitions governing two different CAA programs require that *regulations*

implementing component terms in those statutory definitions themselves be "identical." That ruling, however, rested on a grave misreading of this Court's tax decision, *Rowan Companies, Inc. v. United States*, 452 U.S. 257 (1981); disregarded this Court's repeated instructions on statutory construction; overlooks marked differences between the NSPS and PSD programs; is directly contrary to decisions of the D.C. Circuit and other courts of appeals, and disregards this Court's basic teachings on statutory interpretation.

This case is exceptionally important to the integrity and stability of the jurisdictional regime established in the CAA (and virtually every other major environmental statute) and to the administration of one of the most broadly applicable programs established by Congress to protect and enhance the nation's air quality. It merits this Court's review.

STATEMENT OF THE CASE

Statutory and Regulatory Background. Congress enacted the Clean Air Act amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. 7401(b). The Act assigns EPA the responsibility to adopt implementing regulations and to enforce the statute in tandem with the states, *e.g.*, *Alaska Dept. of Environmental Conservation v. EPA*, 540 U.S. 461 (2004) (*ADEC*).

In order to promote the "even and consistent national application" of EPA's implementing regulations, S. Rep. No. 91-1196, at 40-41 (1970), Congress in Section 307(b) directed that petitions for review of nationally applicable CAA regulations may be filed only in the D.C. Circuit, within 60 days of promulgation, and that suits to review other final actions of regional or local application be brought only in the appropriate regional courts of appeals, 42 U.S.C. 7607(b). See *Harrison v. PPG Industries, Inc.*, 446 U.S. 578 (1980); *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978). Section 307(b)(2) provides that "[a]ction of the Administrator

with respect to which review could have been obtained [by such petition for review] shall not be subject to judicial review in civil or criminal proceedings for enforcement." Section 307(e) provides "[n]othing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section." 42 U.S.C. 7607(e).

The 1970 legislation directs EPA to develop national technology-based standards intended to "force" the development of new and better control technologies. See *Union Elec. v. EPA.*, 427 U.S. 246, 257 (1976). The New Source Performance Standards ("NSPS") require new and "modified" sources to meet technology-based standards developed by EPA and applicable to entire categories of equipment. 42 U.S.C. 7411. "Modification," for purposes of that program, is defined as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source[.]" *Id.* 7411(a). The CAA also directs EPA to establish National Ambient Air Quality Standards (NAAQS) for air pollutants at a level requisite to protect human health and the environment, 42 U.S.C. 7409. States are authorized to establish state implementation plans to achieve and maintain the NAAQS. *Id.* 7410.

In 1977, Congress comprehensively amended the Act. Among this "lengthy, detailed, technical, complex and comprehensive response to a major social issue," *Chevron USA, Inc. v. Natural Resource Defense Council,* 467 U.S. 837, 848 (1984), the 1977 amendments introduced a statutory Prevention of Significant Deterioration ("PSD") program, 42 U.S.C. 7470-7479, "designed to ensure that the air quality in attainment areas or areas that are already 'clean' will not degrade." *ADEC*, 540 U.S. at 470-71 (citation and internal quotation marks omitted); see 42 U.S.C. 7470(1) (PSD intended to "insure that economic growth would occur in a manner consistent with the preservation of existing clean air resources"). States manage increments – caps on permissible

increases of pollutants, see 42 U.S.C. 7473 – through permitting of "major" sources of pollution. 42 U.S.C. 7475, 7479(1), 7602(j). If permitted, major sources constructed or modified in a PSD area must install the "best available pollution control technology" ("BACT"), *id.* 7475(a), identified on a "case-by-case" basis based on environmental, economic, and other factors. See *id.* 7479(3). Facilities subject to PSD must also comply with the NSPS and other CAA requirements. *Id.* 7475(a)(3). See generally *ADEC*, 540 U.S. at 472-75. (Together with corresponding site-specific permitting requirements for nonattainment areas, 42 U.S.C. 7501-7515, PSD review of new and modified sources is called "New Source Review" or "NSR." See *New York*, 413 F.3d at 12-13.).

Whereas the 1970 NSPS program establishes categorical requirements that apply "[w]ithout regard to the effect of the emissions from [an NSPS] facility will have on overall air quality," *Potomac Electric Power Co. v. Environmental Protection Agency*, 650 F.2d 509, 518 (4th Cir. 1981), PSD "focuses on where the plant will be located and its potential effect on its environs," *Citizens for Clean Air v. EPA*, 959 F.2d 839, 849 (9th Cir. 1992), and demands a site-specific review of whether a proposed major source will contribute to a significant degradation of local air quality despite compliance with the NSPS. See 42 U.S.C. 7470(1); *Alabama Power v. Costle*, 636 F.2d 323, 346-51 (D.C. Cir. 1979); 44 Fed. Reg. 51,924, 51,931 (Sept. 5, 1979).

The 1977 amendments granted existing sources a qualified exemption from the PSD requirements based in part on a concern that "[f]or some of the older and smaller sources, it is not physically or economically feasible to retrofit * * * control technology." H.R. Rep. No. 94-1175 at 159 (1976). The resulting environmental harms were understood to be limited, however, because existing plants had limited useful lives and would be retired within a relatively short time. See, *e.g.*, H.R. Rep. No. 94-1175 at 159 ("[I]t is imprudent to backfit FGD [a control technology] into existing plants,

especially older units facing retirement within 10-15 years."); S. Rep. No. 95-127 at 128 (1977) ("There are in the United States approximately 200 old coal-fired power plants over 20 years of age. * * * Most will be totally phased out of operation in the next 5 to 20 years.") (additional views of Sen. Baker).

But consistent with its emphasis on "'a proper balance between environmental and economic goals,'" *New York*, 413 F.3d at 13 (citations omitted), Congress subjected existing major sources that undertake "modifications" to PSD. The PSD provisions define "construction" of a source to include "modification," which, in turn, is defined by cross-reference to the 1970 Act's definition of "modification" for the NSPS program, which embraces physical or operational "changes" to a source that "increase the amount" of any air pollutant emitted. See 42 U.S.C. 7479(2)(C) (PSD "construction" "includes the modification (as defined in section 7411(a) of this title) of any source or facility").

In 1980, EPA promulgated comprehensive PSD regulations specifying what activities satisfy the two statutory requirements for a "modification": (1) a physical or operational "change," and (2) an "increase" in the amount of any air pollutant emitted by the source. 45 Fed. Reg. 52676 (Aug. 7, 1980); see 40 C.F.R. 51.166 (1987).[1] The PSD regulations define an emissions "increase" in terms of "actual emissions," measured in "tons per year." 40 C.F.R. 51.166(b)(2), (3), (21) (1987). EPA emphasized that it had drafted the regulations to comport with the *Alabama Power* court's reading of the PSD statute to emphasize actual

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[1] EPA initially promulgated PSD regulations in 1978, 43 Fed. Reg. 26,380 (June 19, 1978), but it replaced them with new regulations following the D.C. Circuit's decision in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979). The PSD regulations applicable to the activities at issue in this case, which occurred between 1988 and 2000, were promulgated in 1980 and recodified in 1987. See App. 5a n.1. Certain of the activities are governed by a subsequent set of PSD regulations promulgated in 1992, 57 Fed. Reg. 32,314 (July 21, 1992), but the differences are not material here.

impacts of source activity on ambient air. 45 Fed. Reg. at 52699-52700. Thus, EPA's 1980 rules sought "as close a correspondence as possible" between the regulatory coverage of new and modified sources and their actual impacts on air quality and available PSD increment. 45 Fed. Reg. at 52,701. EPA specifically refused to exempt from the emissions-increase calculation additional emissions that occur when physical improvements at an existing facility enable "increased hours of operation or capacity utilization." *Id.* at 52,714. See also *id.* at 52,718.[2] Petitions for review challenging the EPA's 1980 regulations were filed in the D.C. Circuit, and then stayed.[3]

EPA issued a formal interpretation of the 1980 regulations in a 1989 applicability determination concerning the refurbishment of old power generation facilities by the Wisconsin Electric Power Company ("WEPCo"). The agency rejected a utility's contention that *only* increases in the source's maximum emissions "rate" triggered PSD review, explaining that actual emissions are the product of "three factors": (1) the "emissions rate" ("e.g., pounds of sulfur dioxide per ton of coal combusted" emissions per unit of

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[2] The regulations specify, however, that an "an increase in the hours of operation or in the production rate," does not by itself constitute a "physical change or change in the method of operation." 40 C.F.R. 51.166(b)(2)(iii). Regarding its decision to treat increased hours of operation as a PSD trigger only when accompanied by accompanied a physical or operational "change," EPA explained that while "as a general rule Congress intended any significant net increase in such emissions to undergo PSD" review, the statute's "emphasis * * * on 'construction'" indicated an intent not to find a "modification" requiring PSD review when a company merely increases its hours of operation "to take advantage of favorable market conditions." 45 Fed. Reg. at 52704.

[3] Challenges to the 1980 regulations were consolidated in *Chemical Manufacturers Assoc. v. EPA*, No. 79-1112 (D.C. Cir.), then stayed pursuant to a settlement agreement that obligated EPA to consider amendments to its PSD regulations. EPA ultimately decided not to adopt the proposed regulations, see 67 Fed. Reg. at 80204-06, and the revived challenges were addressed in *New York*. See 413 F.3d at 14-15.

production); (2) the "production rate" ("e.g., tons of coal combusted per hour"), and (3) "hours of operation (e.g., hours per year)." *Letter from Don R. Clay, Acting Assistant Administrator for Air and Radiation, to John H. Boston, Vice President, WEPCo.* (Feb. 15, 1989) (CA App. 838). EPA explained that "an increase in any one of these three specified factors, if attributable to a physical or operational change, can trigger an emissions increase for PSD purposes[.]" *Id.*

Reviewing that determination under Section 307(b), the Seventh Circuit upheld EPA's reliance on actual emissions (including those reflecting increased hours of operation). *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990). The court observed that EPA's PSD and NSPS regulations measured emissions increases in "a fundamentally distinct manner," explaining that NSPS "is concerned primarily with increases in emissions rates, expressed in kilograms per hour," whereas "[u]nlike NSPS, PSD is concerned with changes in *total annual emissions*, expressed in tons per year," 893 F.2d at 913, 915 (emphasis original). The court also agreed with EPA that the increased hours of operation made possible by WEPCo.'s extensive upgrading of its facilities did not qualify for the "increased hours of operation" exemption, which "was provided to allow facilities to take advantage of fluctuating market conditions, not construction or modification activity." 893 F.2d at 916 n.11. See also *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292, 297 (1st Cir.1989) (Breyer, J.) (upholding EPA's application of 1980 regulation measuring PSD emissions "increases" to include emissions from increased utilization enabled by physical upgrade and observing that EPA's regulation took account of "the fact that a firm's decision to introduce new, more efficient machinery may lead the firm to decide to increase the level of production, with the result that, despite the new machinery, overall emissions will increase").

Factual and Procedural Background. Respondent Duke operates thirty coal-fired generating units at eight plants in the Carolinas that began service between 1940 and 1975. In the

1980s and 1990s, Duke undertook a "Plant Modernization Program" intended to refurbish these facilities to allow the plants – many of them so worn as to be often or always out of service – to operate more of the time, and to enjoy longer lives. Duke stated that the subject facilities were "no longer reliable because of their age" (CA App. 744), and would that some require a "total rehabilitation" that would extend the facility's useful life an "additional 20 years," "well beyond" its "expected retirement." CA App. 770-72, 776.[4] The costs of rehabilitation were often many times the original cost of the unit. See CA App 730, 785-86. To accomplish the renovations, Duke shut down the units for lengthy periods, in some instances more than a decade. CA App. 756-61.

Unlike the regulated entities in cases like *WEPCo.* and *Puerto Rican Cement*, Duke never sought an applicability determination on whether its modernization undertaking was subject to PSD review; rather it simply proceeded with the project upgrades at the various plants. In December 2000, the United States filed an action against Duke in the United States District Court for the Middle District of North Carolina pursuant to Sections 113(b) and 167 of the CAA, charging that Duke had violated the Act by engaging in 29 "modifications" without obtaining PSD permits required under the Act and the applicable state implementation plans. Petitioners intervened as plaintiffs.

The parties disputed how to measure whether Duke's Modernization Program caused a "significant net emissions increase" under the governing 1980 PSD regulation. 40 C.F.R. 51.166(b) (1987). The United States submitted that those extensive refurbishments would increase emissions by allowing aging facilities that had fallen into sporadic use or total disuse to operate more of the time, resulting in large increases in the actual, annual emissions targeted under the

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[4] A Duke representative told state regulators in 1985 that "[h]istorically, units of this age and condition would be retired and scrapped." CA App. 744.

1980 PSD regulations. However, the district court agreed with Duke's argument that, in employing for the PSD program the same statutory definition of "modification" already in place for the NSPS, Congress intended to adopt an NSPS regulation that (according to the court) employed a "maximum hourly emissions rate" test under which a project refurbishment enabling a plant to operate for more hours, but without changing the maximum emissions rate, would not count as having "increased" emissions. App. 58a-61a. To frame the issue for appeal, plaintiffs stipulated that Duke's activities would not cause a PSD-triggering "net emissions increase" under such a test and, based on that stipulation, the court entered final judgment for Duke. App. 87a.

After initial briefing and oral argument, the Fourth Circuit panel directed the parties (App. 21a) to address the relevance of a case none had cited, *Rowan Companies, Inc. v. United States*, 452 U.S. 247 (1981), in which this Court invalidated certain Treasury regulations that construed identical definitions of "wages" in two sections of the Internal Revenue Code differently. The United States and petitioners argued that the *Rowan* did not call into question EPA's PSD regulations, and that Section 307(b) barred review of the consistency of the regulations with the CAA in this enforcement action.

The Fourth Circuit affirmed the judgment for Duke. It did not adopt the district court's theory that Congress had adopted a specific NSPS regulatory test. Instead it reasoned that "because Congress mandated that the PSD definition of 'modification' be identical to the NSPS definition of 'modification,' the EPA cannot interpret 'modification' under the PSD inconsistently with the way it interprets the term under the NSPS." App. 11a (footnote omitted). The court relied both on "[c]ommon sense," and on *Rowan*, which it read to require that "when Congress itself provided 'substantially identical' statutory definitions of a term in different statutes, the agency charged with enforcing the statutes could not interpret the statutory definitions

'differently.'" *Id.* at 547 (quoting *Rowan*, 452 U.S. at 257).

In a footnote, the Fourth Circuit addressed the appellants' argument that CAA Section 307(b) precluded it from reviewing consistency of the PSD regulations with the statute. The panel stated that "no question as to the validity of the PSD regulations is (or could be, see 42 U.S.C. § 7607(b)) [Section 307(b)], presented here," explaining that "the PSD regulations can be interpreted consistently with pre-existing principles – the NSPS regulations * * *" App. 15a n.7. The Court further stated that its decision did not reflect an "invalidation" of the regulations, but merely a requirement that the PSD regulations and the NSPS regulations be "similarly interpreted and enforced." *Id.*

Nine days later, the D.C. Circuit, exercising jurisdiction under Section 307(b), issued its decision on the consolidated challenges to EPA's 1980, 1992, and 2002 PSD regulations. *New York*, 413 F.3d 3. The court upheld the 1980 PSD regulations at issue here against challenges by an industry coalition including respondent Duke, specifically rejecting industry's argument that Congress, by incorporating for PSD purposes the statutory definition of "modification" initially enacted for the NSPS program, had adopted specific NSPS regulations in place at that time. 413 F. 3d at 19-20. The court ruled that the Act's use of the cross-referencing definition created no such inference about legislative intent, noting among other things that when the PSD definition was added in 1977, two *different* regulatory definitions for NSPS emissions "increases" (one of which industry had not cited) were in place. *Id.*

The D.C. Circuit acknowledged the decision in this case, but found that industry petitioners there had waived the argument that "Congress must use identical regulatory definitions of modification across the NSPS and NSR programs." 413 F.3d at 20. Noting that industry had made "no attack at all on the reasonableness of EPA's definition of modification for NSR (apart from its divergence from one of the 1975 NSPS definitions)" the court "reject[ed] this portion

of industry's challenge to the 1980 and the 2002 rules." *Id.*

In *New York*, the D.C. Circuit set aside a portion of the 2002 regulations, called the "Clean Units" provision, which exempted from PSD review certain changes that increased actual emissions. 413 F.3d at 39-40. The D.C. Circuit ruled that "the plain language of the CAA indicates that Congress intended to apply NSR [which includes PSD] to changes that increase actual emissions instead of potential or allowable emissions[.]" *Id.* at 40.

Petitioners and the United States sought rehearing in the Fourth Circuit. The United States referenced the Fourth Circuit's explanation that Section 307(b) was no bar because the court was "merely mandating one possible interpretation," of the PSD emissions "increase" regulation, and then observed that D.C. Circuit in *New York* had just "held that the statutory language mandates a contrary interpretation," a situation the United States termed as "precisely the type of outcome that [Section 307(b)] was enacted to prevent." U.S. Pet. for Reh. in 04-1763 at 10 (filed Aug. 10, 2005) (2005 WL 1978694). Both petitions were denied.[5]

Shortly thereafter, EPA issued a notice of proposed rulemaking proposing to amend its regulations to establish a "uniform emissions test nationally under the NSPS and NSR programs[.]" 70 Fed. Reg. 61081, 61083 (Oct. 20, 2005). While stating that EPA "respectfully disagreed" with the decision in this case, the notice stated that the need for amendments was "apparent" in light of the panel's ruling. *Id.* at 61083 & n.3.

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[5] Petitions for panel rehearing and rehearing en banc filed by EPA and industry in the *New York* case were denied on December 9, 2005, 2005 WL 3334349 (D.C. Cir.).

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS INVALIDATED NATIONAL CAA REGULATIONS IN VIOLATION OF SECTION 307(b), IN VIOLATION OF THIS COURT'S PRECEDENT AND DECISIONS OF OTHER COURTS OF APPEALS

The court of appeals held that EPA "cannot interpret 'modification' under the PSD inconsistently with the way it interprets that term under the NSPS," because Congress "intended the statutory definitions of 'modification' in the PSD and NSPS provisions to be interpreted identically." App. 14a. This ruling cannot be fairly read as anything short of an invalidation of the test for "emissions increases" set forth in EPA's 1980 regulations – turning on changes in actual, annual emissions, measured in "tons per year," 40 C.F.R. 51.166(b)(3), (21) (1987) – as contrary to the statute.[6]

In reaching that holding, the Fourth Circuit disregarded all three of the distinct limitations on the timing, forum, and type of judicial review proceedings that Section 307(b) imposes: exclusive D.C. Circuit review of national CAA regulations; filing of challenges within 60 days; and the command that EPA actions reviewable by petition for review "shall not be subject to judicial review" in enforcement proceedings. See also 42 U.S.C. 7607(e).

The basis of the Fourth Circuit's ruling was *not* the application of EPA's regulations to particular facts; rather the court announced a categorical rule, based on assertedly "plain" statutory language, that EPA lacks the authority to adopt PSD modification regulations that interpret emissions "increase" – a component term of the modification definition – differently from how EPA's NSPS regulations interpret that

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[6] As we explain below, the Fourth's explanation that Section 307(b) was no bar because the court was merely "interpreting" the 1980 regulations, App. 11a n.7, was demonstrably wrong (and if correct would still not have justified the court's action).

term. See App. 14a-18a. Indeed, the court candidly acknowledged that because (in its view) Congress had "directly spoken to the precise question at issue * * * the language and various interpretations of the PSD regulations" were "largely irrelevant to the proper resolution of this case." App. 11a n.3. But Section 307(b) expressly forbids courts from engaging in such statutory-consistency review of national EPA regulations in an enforcement proceeding.

The Fourth Circuit's decision here represents an abrupt departure from the decisions of other courts of appeals, which have held that contentions that CAA regulations are contrary to statute are cognizable only in the D.C. Circuit, and are barred from enforcement proceedings.[7] These courts have correctly regarded the limitations in Section 307(b) (and the similar or identical limitations on judicial review provided in many other major regulatory statutes, see p. 28-29, *infra*) as circumscribing the "subject matter jurisdiction" of federal courts that are asked to review EPA regulations and other final agency actions. See *United States v. Ethyl Corp.*, 761 F.2d 1153, 1154 (5th Cir. 1985).[8] They have emphasized the

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[7] See, *e.g.*, *Enviro Tech International, Inc. v. EPA*, 371 F.3d 370 (7th Cir. 2004) (review of EPA regulations "not within our own authority," because "that task belongs to" the D.C. Circuit); *United States v. Kung-Shou Ho*, 311 F.3d 589, 607-08 (5th Cir. 2002) (challenge to definition of "facility" in 1990 CAA regulations had to be brought in D.C. Circuit); *United States v. Walsh*, 8 F.3d 659, 664 (9th Cir. 1993) (declining to review regulations that were "challengeable under the procedures and limits set out in 42 U.S.C. § 7607(b)(1)"). See also *Siegelman v. EPA*, 911 F.2d 499 (11th Cir. 1990) (claim that "EPA's regulation conflicts with an act of Congress" may not be entertained in enforcement proceeding under RCRA provision, 42 U.S.C. 6976(a)(1), similar to CAA Section 307(b)); *Chemical Weapons Working Group, Inc. v. U.S. Dept. of the Army*, 111 F.3d 1485, 1492 (10th Cir. 1997); *WEPCo.*, 893 F.2d at 914; *Hawaiian Elec. Co., Inc. v. E.P.A.*,, 723 F.2d 1440, 1445 (9th Cir. 1984).

[8] See also, *e.g.*, *Pan American Grain Mfg. Co., Inc. v. EPA*, 95 F.3d 101, 103 (1st Cir. 1996); *Greenpeace, Inc. v. Waste Technologies Industries*, 9 F.3d 1174, 1180 (6th Cir. 1993); *United States v. Walsh*, 8 F.3d 659, 664 (9th Cir. 1993); *Ohio Environmental Council v. United States District Court*, 565 F.2d 393, 397 (6th Cir. 1977).

practical importance of adhering to Section 307(b)'s prescriptions in light of its "clear language and Congress's manifest intent to avoid protracted and inconsistent adjudication." *Id.* at 1156. They have recognized, as has this Court, Section 307(b)'s careful language limiting and channeling judicial review of CAA implementation, means "exactly what it says." *Harrison*, 446 U.S. at 589. See also *Hallstrom v. Tillamook County*, 493 U.S. 20, 31 (1989) (holding that statutory prerequisites to citizen suits under Solid Waste Disposal Act was "mandatory" and leave courts no "discretion" to "disregard these requirements").

This is not the first unauthorized attack on these very 1980 PSD regulations. In *Puerto Rican Cement*, 889 F.2d 292, the First Circuit ruled that the petitioner in a Section 307(a) proceeding for review of a final EPA action of local or regional applicability could not challenge the 1980 PSD "emissions increase" regulations at issue here (as incorporated in the parallel rules governing federally administered PSD areas, see 40 C.F.R. 52.21(b) (1987)). Pointing to the pending but stayed judicial review proceeding in the D.C. Circuit, see n. 3, *supra*, Judge Breyer wrote:

> EPA promulgated the regulations in question in 1980, see 45 Fed. Reg. 52,735 (1980); other parties have challenged their lawfulness in a suit filed in the Court of Appeals for the District of Columbia, see *Chemical Mfrs. Ass'n v. EPA*, No. 79-1112 (D.C.Cir.). The Company has not tried to intervene in that suit (which is still pending). It seems obviously too late for the Company to mount an independent legal challenge here. See *Hawaiian Elec. Co.* [v. *EPA*], 723 F.2d [1440, 1447 (9th Cir.1984)] (holding that a challenge to another provision of 40 C.F.R. § 52.21 was untimely under 42 U.S.C. § 7607(b)(1)).

889 F.2d at 299. See also *WEPCo.*, 893 F.2d at 914 n.6. It should be noted that the prohibitory line the Fourth Circuit leapt across here was far brighter than the one the First Circuit properly declined to cross: This case is an *enforcement action*, governed not only by the 60-day and

D.C. Circuit-only limitations at issue in *Puerto Rican Cement*, but also by Section 307(b)(2)'s specific command that courts "shall not" entertain collateral attacks to EPA regulations and other final actions in enforcement actions. And it comes fully 16 years after the challenge that was "obviously too late" in *Puerto Rican Cement*.

The court of appeals' decision is also in tension with this Court's Section 307(b) decisions. In *Adamo Wrecking*, 434 U.S. 275, a criminal enforcement proceeding against a company alleged to have violated an EPA emissions standard for asbestos, this Court ruled that Section 307(b) did not bar the defendant from interposing the defense that the requirement in question did not constitute an "emissions standard" under the CAA. *Id.* at 285. The Court emphasized the criminal-enforcement context and uncertainty about whether Section 307(b)'s bar was intended to extend to EPA's threshold determination on what is an "emissions standard." Even as it permitted the company to assert this limited defense, the majority emphasized that it was

> aware of the possible dangers that flow from this interpretation; district courts will be importuned, under the guise of making a determination as to whether a regulation is an 'emission standard,' to engage in judicial review in a manner that is precluded by Section 307(b)(2) of the Act. This they may not do.

Id. at 285. In a dissenting opinion joined by two other Justices, Justice Stewart expressed concern that even the limited form of review permitted by the majority's ruling would "frustrate[] the intent of Congress to establish a speedy and unified system of judicial review under the Act," "invite[] precisely the sort of inconsistent judicial determinations by various courts that Congress sought to prevent," and undermine legislative intent "to maintain the integrity of the time sequences provided throughout the Act." *Id.* at 292. He perceived a "camel's nose" in the tent, and "fear[ed] that the rest of the camel" was "almost certain to follow." *Id.* at 293.

The Fourth Circuit's decision here highlights the risks of

circumventing Section 307(b) noted by majority and dissenters alike in *Adamo Wrecking*. See *United States v. Ho*, 311 F.3d 589, 607 (5th Cir. 2002) (*Adamo Wrecking* "specifically forebade" lower courts from considering procedural or substantive inquiries into a regulation during an enforcement proceeding). And here -- where the challenger had every opportunity to present the argument in a D.C. Circuit Section 307(b) petition proceeding -- no due process concerns are present that might arguably warrant a relaxation of the express prohibition on collateral attack set forth in Section 307(b). See *Ethyl Corp.*, 761 F.2d at 1156 ("we would be remiss to allow the narrow holding of *Adamo Wrecking* to bulldoze the statute's jurisdictional limitations in civil enforcement proceedings") (citing *City of Seabrook v. EPA*, 659 F.2d 1349, 1370 (5th Cir. 1981)). Indeed, Section 307(b) protects interests in procedural regularity and fairness – affording EPA, states, regulated entities, and environmental groups alike clear rules on when, where, and how CAA regulations may be challenged – that strongly disfavor the sort of end run allowed here.

The reasons the Fourth Circuit gave for avoiding Section 307(b) only compound its jurisdictional error. In response to objections that EPA's regulations were subject to exclusive review in the D.C. Circuit, the Fourth Circuit contended that it was merely addressing an "interpretation" of EPA's 1980 PSD regulations. See App. 11a n.7. The court reasoned that "the PSD regulations can be interpreted consistently" with the NSPS regulations, citing without any analysis the *district court*'s interpretation of the regulations (which EPA and petitioners contended was patently incorrect),[9] and opined

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[9] The district court misread the provision of the 1980 regulations that provides that an increase in hours of operation or production rate does not constitute a "physical change" under the first prong of the modification test, 40 C.F.R. 51.166(b)(2)(iii)(f) (1987), to mean that even where there is a physical change at a facility, the emissions increases from increased hours of operation enabled by the change are not counted toward increases. App. 59a-62a. But under the plain language of the regulations,

that a "choice of this interpretation – as required under the statute – over the EPA's interpretation is not an invalidation of those regulations." *Id.*

Even if one disregards the panel's own acknowledgement that the "the language and various interpretations of the PSD regulations" were "largely irrelevant to the proper analysis of this case," App. 15a n.7, the Fourth Circuit's asserted reason for bypassing Section 307(b) is demonstrably wrong. Undermining its claim to be engaged in "interpretation" of the regulations, the court made *no* effort to follow the lodestar in any such endeavor -- the regulatory *text*. See *Christensen v. Harris County*, 529 U.S. 576, 587-88 (2000). As other courts of appeals have recognized (in cases *properly* before them under Section 307(b)), the NSPS and PSD regulations *say* very different things, and these plain textual differences have clear consequences. Among other things, the NSPS regulation in question targets "emissions rates" measured in kilograms per hour, 40 C.F.R. 60.14(b) (1987), whereas the PSD regulations address "actual emissions" in "tons per year," 40 C.F.R. 51.166(b)(2), (3), (21) (1987). As the D.C. Circuit explained: "While the NSPS regulatory definition of modification allegedly focuses on the hourly rate of emissions, the NSR definition focuses on net emissions increases measured in tons per year. Compare 40 C.F.R. 60.14 (NSPS with *id* 52.21(b)(2)(ii) (NSR)." *New York*, 413 F.3d at 18. The Seventh Circuit highlighted that same marked difference in *WEPCo*, 893 F.2d at 905. See also, *e.g.*, 57 Fed. Reg. 32,314, 32,316 (July 21, 1992) (contrasting the NSPS and PSD tests for emissions increase).

The court's suggestion that the PSD regulations can be "interpreted" to mean the same thing as the NSPS regulations

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the "increased hours" exclusion extends only to the "physical change" inquiry, not the separate "emissions increase" inquiry. Compare 40 C.F.R. 51.166(b)(2)(iii)(f) with 40 C.F.R. 51.166(b)(3)(i)) (App. 102a, 103a). EPA made this clear when it promulgated the regulations in 1980, 45 Fed. Reg. at 52704, and the district court's misconstruction was explicitly rejected in *WEPCo.*, 893 F.2d at 916 n. 11.

is contrary to analysis in *WEPCo*, 893 F.2d at 905; *Puerto Rican Cement*, 889 F.2d at 296-97; *and* to the D.C. Circuit in the decision authoritatively reviewing the regulations under Section 307(b), *New York*, 413 F.3d at 18. Those courts correctly recognize that the test of emissions increases established under the 1980 PSD regulations is different in textual expression, method of application, and concrete consequences from the hourly "emissions rate" standard under the NSPS regulation highlighted by the district court and the Fourth Circuit. The differences between the maximum hourly emissions rate mandated by the Fourth Circuit and the actual, annual emissions standard expressed in the PSD regulations are large – often (as here) determinative of whether a pollution source will be treated as having increased emissions a great deal, or not at all. See, *e.g.*, *New York*, 413 F.3d at 15 (illustrating consequences of choice between maximum-hourly and actual-annual standards by reference to the facts of *Puerto Rican Cement*, 889 F.2d at 293, 296-98). See also p. 27, *infra*.

Because the 1980 PSD regulations *cannot* be read to provide for the "hourly rate" test ostensibly provided under the NSPS regulations, the Fourth Circuit's rationale for sidestepping Section 307(b) was insupportable. Even had the court actually engaged in close textual exegesis, no amount of "interpretation," however artful, could eliminate the clear differences between the respective regulations (differences that alone seem to violate the panel's conclusion that the CAA requires "the statutory definitions of 'modification' in the PSD and NSPS provisions to be interpreted *identically*." App. 14a (emphasis added).

But even if the court had been correct that it was merely mandating one linguistically possible and statutorily required "interpretation" of the PSD regulations, it still would have lacked authority to strike down EPA's regulatory test for PSD emissions "increases." Contrary to the panel's view, EPA's authoritative "interpretations" of CAA regulations are not somehow exempt from Section 307(b)'s strictures. As this

Court made clear in *Harrison*, 446 U.S. 578, Section 307(b)(1)'s limitations apply not only to regulations, but also to "any other final action" of EPA. Concluding that Section 307(a)'s broad language "must be construed to mean exactly what it says," *id.* at 584, the Court held that a petition for review was the exclusive means of review of an EPA determination that the NSPS applied to respondent's waste-heat boilers.

As the D.C. Circuit explained in *New York*, EPA had repeatedly reaffirmed as the governing standard under the 1980 PSD regulations a test comparing "past annual emissions" to "future annual emissions" – and not the industry petitioners' favored "maximum hourly emissions rate" test. See 413 F.3d at 15 (citing *Puerto Rican Cement Co.*, 889 F.2d 292; *WEPCo.*, 893 F.2d 901; 57 Fed.Reg. 32,314, 32,328 (July 21, 1992), and 67 Fed. Reg. 80,186, 80,199 (Dec. 31, 2002)). If, rather than simply forging ahead with its Plant Modernization Program, Duke had sought an applicability determination from EPA (the course followed by the regulated entities in cases like *Puerto Rican Cement* and *WEPCo.*), it could have filed a petition for review testing EPA's application of its regulations to particular facts (though *not* the legality of the regulations themselves). See *Puerto Rican Cement*, 889 F. 2d at 296-97, 299-300. Had Duke challenged regulations or actions of "national" applicability, its petition had to be filed in the D.C. Circuit.[10] What Duke could not lawfully do, under the statute, is what it was allowed to do here: obtain invalidation of EPA's regulatory definition of PSD emissions "increase" in an enforcement proceeding. See *Adamo Wrecking Cos.*, 434 U.S. at 285; *Puerto Rican Cement*, 889 F.2d at 299-300.

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[10] Suits for review of EPA actions of local or regional applicability may be filed in the regional court of appeals; however, as *Puerto Rican Cement* illustrates, the validity of EPA's national PSD rules would not have been reviewable in such an action. 889 F.2d at 299-300. See also Section 307(b)(1) (exclusive D.C. Circuit review if EPA certifies that "local" decision was "based on a determination of nationwide scope or effect").

This time Justice Stewart's camel has appeared, not as a nose, but as a camel. The Fourth Circuit's ruling cuts a gaping loophole in Section 307(b)'s carefully crafted scheme for judicial review, and it merits this Court's review.

II. THE COURT OF APPEALS' RULING THAT EPA MUST ADOPT IDENTICAL REGULATORY DEFINITIONS OF EMISSIONS "INCREASE" UNDER THE NSPS AND PSD PROGRAMS IS INCORRECT AND CONTRARY TO DECISIONS OF OTHER COURTS OF APPEALS

Having overstepped Section 307(b) limitations on its authority, the Fourth Circuit proceeded to misinterpret the CAA. The court's holding that Congress's use of the same statutory definition of "modification" in the PSD and NSPS provisions "mandated" that EPA interpret an undefined component of that larger definition – emissions "increase" – must be "identically" (App. 14a) for the two programs conflicts with decisions of other courts of appeals, and the "effectively irrebuttable" (App. 17a) interpretive presumption it employed is contrary to this Court's oft-repeated teachings.

Since the earliest days of the PSD program, courts have recognized that terms common to PSD and NSPS – including component terms of the common statutory definition of "modification" – can and should be given different definitions to fulfill those programs' distinct functions and aims. In *Alabama Power*, the D.C. Circuit held that the term emissions "increase" in the CAA's definition of "modification" for PSD – the very term at issue here -- can be interpreted differently for those two programs. 636 F.2d at 401. That court upheld EPA's use of a "bubble" concept ("netting") in measuring emissions increases for PSD, explaining that while *ASARCO Inc. v. Environmental Protection Agency*, 578 F.2d 319 (D.C. Cir. 1978), had held that "a bubble concept would be contrary to the intent of the NSPS provisions," such was "clearly not the case with regard to the PSD provisions." *Alabama Power*, 636 F.2d at 402. As the same court recently explained in *New*

York, EPA's regulations have for decades rested on the understanding that the agency can make reasonable distinctions in its regulations governing NSPS and PSD "modifications" to reflect significant differences between the respective programs work. See 413 F.3d at 11-17, 18. See also *Citizens for Clean Air*, 959 F.2d at 849 ("definitions of the statutory terms are not necessarily transferable between the PSD and NSPS programs"); *WEPCo*, 893 F.2d at 915 ("[u]nlike NSPS, PSD is concerned with changes in *total annual emissions*, expressed in tons per year").

The decision below conflicts with the D.C. Circuit's decision in *New York* in multiple respects. *New York* confirms that, contrary to the Fourth Circuit's theory, the PSD regulation clearly establishes the actual, annual emissions standard the Fourth Circuit believed it could "interpret" away. 413 F.3d at 18. And while the D.C. Circuit found that the "identical regulatory definitions" theory adopted by the Fourth Circuit had been waived, the court's forceful rejection of industry's closely related argument (advanced by Duke in this case) that Congress in 1977 had adopted NSPS regulations embracing an hourly emissions rate test for use in the PSD program, 413 F.3d at 19-20, is wholly incompatible with the Fourth Circuit's analysis here. The D.C. Circuit observed that there were multiple regulatory definitions of "modification" in place in 1977 when Congress added the modification definition for PSD purposes, 413 F.3d at 19, undercutting any notion that Congress intended to impose a unitary, all-purpose regulatory definition covering both programs. And, contrary to the Fourth Circuit, the D.C. Circuit ruled that EPA not only may, but must, tailor its regulatory test for PSD emissions increases to the distinctive statutory requirements of the overall PSD program. See *id.* at 39-40 (PSD provisions, including definition of BACT, *obligate* EPA to apply PSD "to changes that increase actual emissions instead of potential or allowable emissions").

The court of appeals misread *Rowan*, 452 U.S. 247, as "dictat[ing]" the conclusion that Congress "affirmatively

mandated" that the term "modification" "be interpreted identically" by EPA in implementing the PSD and NSPS programs. 411 F.3d at 550. The court reasoned that the "presumption" under *Rowan* was "effectively irrebut[t]able" even by resort to acknowledged "differences between" the "purposes" of the two statutory programs in which the two definitions are found. Pet. App. 17a-18a.

Rowan does not, in fact, support that surprising principle. In *Rowan*, the Court found that the use of nearly identical language in defining the term "wages" in two revenue statutes was "strong evidence" that Congress intended the term to have identical meaning across them, and that Treasury had failed to "implement the congressional mandate in a consistent and reasonable manner." 452 U.S. at 253, 255. It did not treat Congress's use of identical definitions as dispositive, but relied on legislative history evincing a specific congressional intent that the agency define the term "wages" the same way in order to promote "simplicity and ease of administration," a goal ill-served by "[c]ontradictory interpretations of substantially identical definitions." 452 U.S. at 255-57 (quoting S. Rep. No. 77-1631 at 165 (1942)). Here, Congress expressed no intent that terms common to PSD and NSPS be interpreted "identically" and without regard to differences between the programs. To the contrary, Congress, in separate enactments separated by seven years, inserted the definitions of modification into two separate programs that, as courts and EPA alike have repeatedly noted, have distinctly different purposes and mechanics. See pp. 5, 17-18, *supra*.[11]

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[11] In *Rowan* the Court noted that Treasury had abandoned its original interpretation of the term "wages," a "substantially contemporaneous construction of the statute by those presumed to have been aware of congressional intent." may inform a court's construction. 452 U.S. at 253, 258-59. By contrast, in PSD regulations enacted only a year after the 1977 amendments, EPA adopted a definition of modification that differed from the NSPS definition. Compare 40 C.F.R. 52.21(b)(2) (1979) (PSD modification requires increases above a threshold) with 40 C.F.R. 60.14(a) (1979) (NSPS – no threshold). See also *New York*, 413 F.3d at 13-15.

This Court has rejected any "effectively irrebut[t]able" presumption of the sort the Fourth Circuit invoked. It has repeatedly emphasized that terms appearing in different places in a statute – like the term "increases" in the CAA's NSPS and PSD provisions – necessarily gather meaning from the different contexts in which they are used. See *General Dynamics Land Systems v. Cline*, 540 U.S. 581, 595 (2001) ("'the presumption that identical words used in different parts of the same act are intended to have the same meaning * * * is not rigid and readily yields whenever there is variation in the connection in which the words are used to warrant the conclusion that they were employed in different parts of the act with different intent'") (citations omitted); *United States v. Cleveland Indian Baseball Co.*, 532 U.S. 200, 213 (2001) (likening irrebuttable presumption of identical meaning to "original sin") (citation omitted).[12]

The Fourth Circuit failed to heed these instructions, relying instead on an abstract presumption favoring regulatory identity despite "the different purposes of the NSPS and PSD programs," App. 18a, and giving no consideration to how its abstract rule of "identity" would affect the central elements of the PSD enactment (or the NSPS provisions), nor to the reasons why EPA opted to use an "actual annual" emissions test for PSD. Cf. *New York*, 413 F.3d at 22, 23-24 (noting that "[d]ifferent interpretations of

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[12] As the court here observed (App. 4a, 9a), the cross-referenced PSD definition of modification, 42 U.S.C. 7479(C), was added in "technical and conforming" amendments, passed months after the main 1977 CAA amendments, whose sponsor indicated the PSD modification definition was proposed to "to conform" to the "usage in other parts of the Act." Pub. L. No. 95-190, § 14, 91 Stat. 1393, 1399-1404; 123 Cong. Rec. 36,250, 36,252, 36,331 (1977) (statement of Sen. Muskie). As the D.C. Circuit noted in *New York*, Congress's use of a cross-reference to establishing the PSD definition was the equivalent of "having simply repeated" in the PSD context "the definitional language used before in the NSPS context," revealing "no more than if Congress had used a little more ink and repeated the NSPS definitions verbatim." 413 F.3d at 19.

the term 'increases' may have different environmental and economic consequences").

The court of appeals' embrace of an "effectively irrebuttable" presumption obviating all need to look at statutory context and purposes was fundamentally inconsistent with this Court's teachings on the "holistic endeavor," *Koons Buick-Pontiac GMC v. Nigh*, 125 S. Ct. 560, 566-67 (2004) (citations omitted), that is statutory construction. This Court has repeatedly emphasized the need to read statutory words "'in their context and with a view to their place in the overall statutory scheme,'" *Raygor v. Regents of U. of Minnesota*, 534 U.S. 533, 546 (2002) (citations omitted), and in light of statutory purposes, see *Nixon v. Missouri Municipal League*, 541 U.S. 125, 144 (2004) ("in all cases," courts' "task is to interpret the words of [the statute] in light of the purposes Congress sought to serve"); *US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002) (rejecting reading under which statute "could not accomplish its intended objective").

That the statutory test of modification is the same for both NSPS and PSD programs did not answer the "precise question at issue," *Chevron*, 467 U.S. at 842, whether EPA could adopt regulations implementing component terms in that definition – here, the *undefined* and pivotal statutory term, emissions "increase" – differently across the two programs to accommodate real, explicit differences in the programs' legislatively prescribed mechanics and purposes.

Indeed, CAA provisions unique to the PSD program led the D.C. Circuit in *New York* to rule that EPA *must* use an "actual" emissions standard for measuring PSD emissions increases. 413 F.3d at 38-40. The court there rejected, as contrary to the language of the PSD statute (including the definition of BACT), EPA's use in the 2002 PSD regulations of a "potential" emissions standard for measuring "modifications" – the standard that the Fourth Circuit ruled is statutorily *required* for PSD (because it is used in the NSPS regulations). Other CAA provisions that are specific to the

PSD program support EPA's decision to adopt a PSD emissions increase test based on actual, annual emissions – even if EPA chooses to use a maximum-hourly-rate test to identify NSPS emissions increases. The fundamental purpose of the PSD program is to regulate and protect local air quality, 42 U.S.C. 7470 – making it essential that any test of emissions capture real-world changes in emissions. See *Alabama Power*, 636 F.2d at 353 (statute requires "actual emissions" standard); *New York*, 413 F.3d at 39-40 (CAA forecloses emissions-increase test based on "potential or allowable emissions"); 45 Fed. Reg. at 52680 (under 1980 regulations reductions, increases in emissions "will be quantitatively assessed on the basis of an 'actual emissions' baseline, rather than a 'potential to emit' baseline"); *id.* 52699-52700 (discussing "actual, annual emissions" measure for emissions increase). Numerous other provisions of the PSD statute depart from the NSPS provisions in ways that lend specific support to EPA's "actual, annual" test, and undermine any suggestion that Congress intended that EPA's regulations defining the statutorily undefined term, emissions "increase," be identical to regulations under the NSPS program.[13]

The Fourth Circuit's peremptory rule of identity led it to disregard the consequences of the interpretation it adopted. A test for emissions increases that is triggered only by increases in maximum hourly emission rate artificially excludes from

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[13] PSD applies only to "major sources," a class defined by the ability to emit specified pollutants in "tons per year," 42 U.S.C. 7475, 7602(j), and provides a limited exemption for the "expansion or modification" of an existing facility whose emissions will be less than "fifty tons per year." *Id.* 7475(b). Major sources undergoing PSD review must demonstrate that they will not violate an area's "annual" increment, a showing that includes the submission of "one calendar year" of monitoring data. *Id.* 7475(d)(2)(C), (D). Under the Fourth Circuit's approach, conventional reliance on statutory context and structure was out of bounds, because Congress's choice of identical definitions for NSPS and PSD "irrebuttably" prevailed despite any differences between the programs' purposes or mechanics.

the "emissions increase" inquiry one of the three basic factors – hours of operation – that (along with production rate and emissions rate, see *supra*, pp. 7-8) determines how much pollutant a source actually releases into the air. Whether or not such a test fits with the NSPS provisions, it surely undermines Congress's purpose in subjecting "modifications" to PSD review, disregarding as it does real, physical increases in emissions of hundreds of tons and offering "vistas of indefinite immunity," see *WEPCo.*, 893 F.2d at 909, to aging facilities that Congress in 1977 expected would soon be retired. Nothing in the CAA's cross-referenced NSPS/PSD definition of "modification," or in *Rowan*, required such a result.

III. THE CASE PRESENTS RECURRING ISSUES OF NATIONAL IMPORTANCE

The decision below stands as a monument to why Congress chose not to allow for challenges to EPA regulations in enforcement proceedings: The Fourth Circuit set aside as contrary to statute a regulatory test for emissions increases set forth in 25-year-old regulations, and elaborated and applied in *WEPCo* and *Puerto Rican Cement*. It announced a novel and broad rule that the CAA demands uniformity between EPA's NSPS and PSD source modification regulations that conflicts with *Alabama Power* and later decisions confirming EPA's authority to distinguish between NSPS and PSD in defining emissions increases. The court did all this while the regulations in question were before the D.C. Circuit in a Section 307(b) review proceeding in which industry challengers (including Duke) waived the argument adopted by the Fourth Circuit. The court of appeals' decision holding unlawful EPA's use of a PSD "actual, annual" test of PSD emissions increases, and the statutory interpretation underlying it, are starkly inconsistent with the D.C. Circuit's *New York* decision, and the ruling has prompted EPA to initiate a rulemaking despite its continued disagreement with the decision.

Left unreviewed, this extraordinary sequence will surely invite litigants to try to circumvent Congress's carefully wrought and exclusive scheme of CAA review by presenting challenges to EPA regulations in enforcement actions or other district court proceedings.[14] The Fourth Circuit's willingness to issue a broad ruling striking down venerable regulations with only a perfunctory nod toward Section 307(b) will surely invite and support future efforts at thinly veiled, piecemeal collateral attacks on national CAA rules – just the result eight members of the Court feared in *Adamo Wrecking*. And the panel's casual and legally inaccurate explanation that Section 307(b) somehow does not bar challenges to the "interpretation" of regulations – a theory the panel elsewhere appeared to disavow, App. 11a n.3 – provides a large-print roadmap for such evasions.

The decision is all the more troubling because the judicial review provisions of many other major environmental and public health statutes are nearly identical to CAA Section 307(a), among them the Clean Water Act, 33 U.S.C. 1369(b); the Oil Pollution Act, 33 U.S.C. 2717(a); the Safe Drinking Water Act , 42 U.S.C. 300j-7; the Noise Control Act, 42 U.S.C. 4915(a); the Resource Conservation and Recovery Act, 42 U.S.C. 6976(a); and CERCLA, 42 U.S.C. 9613(a). The Fourth Circuit's disregard for the bar on collateral attack on EPA regulations will harm the various interests – from EPA, to state air administrators, to environmental groups, to business competitors – who should be able to rely on adherence by litigants and courts to the exclusive mechanisms provided for in CAA Section 307(b). This is particularly so given the enormous time and expense that are invested in jurisdictionally appropriate, multi-party review proceedings in the D.C. Circuit that the Section 307(b) scheme fosters.

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[14] By allowing Duke to prevail on an argument it had *waived* in the tribunal exclusively empowered by Congress to hear challenges to EPA regulations, the ruling will tempt parties selectively to withhold from the D.C. Circuit challenges they deem more viable in other fora.

The court of appeals' reading of the CAA's definition of "modification" unsettles decades of judicial precedent and administrative policy and practice built around the recognition that EPA may make reasonable distinctions in its implementation of the component terms of the statutory "modification" definition. The court of appeals' broad and categorical requirement of identity between the NSPS and PSD regulations will be invoked as a basis to restrict EPA's flexibility to administer the PSD and NSPS programs in the future.[15] And the court's misreading of *Rowan* to create an "effectively irrebuttable" presumption so powerful as to foreclose inquiry into statutory context or purpose, or empirical consequences, threatens mischief even beyond the important questions of environmental law presented here.

The profound implausibility of the Fourth Circuit's reading of the statute, and the likelihood that it will foster further litigation, are apparent in EPA's recent notice of proposed rulemaking. There, EPA acknowledged that even its proposed regulations will be inconsistent with the regulatory "identity" requirement the Fourth Circuit found in the CAA's plain language, but insisted that "[t]here are differences between the two programs that prevent a wholesale adoption of the NSPS modification definition into the major NSR provisions." 70 Fed. Reg. at 61090.[16]

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[15] The validity of the "actual, annual" test will retain considerable importance regardless of whether EPA proceeds with its proposal to amend its regulations in response to the decision – since any new regulations would be prospective and would not apply to numerous major enforcement proceedings that are pending. *U.S v. AEP*, Consol. Nos. C2-99-1182 and C2-99-1250 (S.D. Ohio filed June 28, 2005); *U.S. v. Cinergy*, No. 99-C-1693 (S.D. Ind. filed Nov. 3, 1999); *U.S. v. Alabama Power*, No. 01-152-VEH (N.D. Ala. filed Jan. 12, 2002); *U.S. v. East Kentucky Power Coop.*, No. CV-04-34 (E.D. Ky. filed January, 2004).

[16] EPA cited various ways in which the NSR/PSD and NSPS programs differ, and added (70 Fed. Reg. at 61090 n.30): "We disagree with the Fourth Circuit's holding in *Duke Energy*, and thus believe we are able to make reasonable distinctions between the NSPS and NSR programs where appropriate."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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United States Court of Appeals,
Fourth Circuit

UNITED STATES OF AMERICA, Plaintiff-Appellant,
ENVIRONMENTAL DEFENSE; NORTH CAROLINA SIERRA CLUB; NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP CITIZEN LOBBY/EDUCATION FUND, Intervenors/Plaintiffs-Appellants,
v.

DUKE ENERGY CORPORATION, Defendant-Appellee.

No. 04-1763.

Argued and Submitted February 3, 2005.
Filed June 15, 2005.

Todd Sunhwae Kim, United States Department of Justice, Environment & Natural Resources Division, Washington, D.C., for the United States.
James Blanding Holman, IV, Southern Environmental Law Center, Chapel Hill, NC, for Appellants Environmental Defense, North Carolina Sierra Club, and North Carolina Public Interest Research Group Citizen Lobby/Education Fund.
F. William Brownell, Hunton & Williams, Washington, D.C., for Appellee.
Before LUTTIG and MOTZ, Circuit Judges, and Samuel G. WILSON, United States District Judge for the Western District of Virginia, sitting by designation.

MOTZ, Circuit Judge:

The United States brought this enforcement action against Duke Energy Corporation, which provides North Carolina and South Carolina with electricity generated from eight plants located throughout the two states. The United

States maintains that Duke Energy on numerous occasions modified these plants without first obtaining appropriate permits in violation of the Clean Air Act. 42 U.S.C. §§ 7401 *et seq.* (2000). The district court granted summary judgment to Duke Energy. *See United States v. Duke Energy Corp.*, 278 F. Supp. 2d 619 (M.D.N.C. 2003). We affirm, albeit for somewhat different reasons than those relied on by the district court.

I.

The Clean Air Act is a complex statute supported by an elaborate regulatory scheme; both have a complicated history. This case involves two different, but complementary provisions of the Act: the New Source Performance Standards ("NSPS") provisions, 42 U.S.C. § 7411, and the Prevention of Significant Deterioration ("PSD") provisions, 42 U.S.C. §§ 7470-92.

In order to "protect and enhance the quality of the Nation's air resources" and "promote the public health and welfare," 42 U.S.C. § 7401(b)(1), the Clean Air Amendments of 1970 directed the Environmental Protection Agency ("EPA") to devise National Ambient Air Quality Standards establishing the maximum concentrations of certain air pollutants allowable in each region of the United States. 42 U.S.C. § 7409. The Act then directed each State to design a State Implementation Plan to effect compliance with its air quality standards. 42 U.S.C. § 7410.

To help attain and thereafter maintain these air quality standards, the 1970 amendments enacted the NSPS provisions, which required the EPA to promulgate standards regulating emissions from both newly constructed and modified sources of pollution at power plants. 42 U.S.C. § 7411. Congress defined "modification" in the NSPS provisions as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or

which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4).

Since 1971, the EPA has promulgated NSPS regulations that define "modification" in virtually the same words as the statute. *See, e.g.*, 36 Fed. Reg. 24,876, 24,877 (Dec. 23, 1971); 40 C.F.R. § 60.2 (1976); 40 C.F.R. § 60.2 (2004). In 1975, the EPA added a regulation elaborating on this definition and further defining "modification" by reference to an increase in the hourly emission rate: a modification includes "any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any [regulated] pollutant," measured not in tons per year, but in kilograms per hour. 40 Fed. Reg. 58,416, 58,419 (Dec. 16, 1975) (codified at 40 C.F.R. § 60.14(a) & (b)). Modified equipment becomes subject to the NSPS's "technology-based" standards, *Alabama Power Co. v. Costle,* 636 F.2d 323, 346 (D.C. Cir. 1980), which mandate the installation of the "best demonstrated pollution control technology." *Potomac Elec. Power Co. v. EPA,* 650 F.2d 509, 518 (4th Cir. 1981) [hereinafter *PEPCo*].

The NSPS program was not entirely successful. *See Wisconsin Elec. Power Co. v. Reilly,* 893 F.2d 901, 904 (7th Cir. 1990). In 1972, the United States District Court for the District of Columbia issued a preliminary injunction directing the EPA to promulgate regulations to supplement the NSPS program and protect air quality from deterioration in areas that had met or exceeded the relevant ambient standards. *See Sierra Club v. Ruckelshaus,* 344 F. Supp. 253 (D.D.C. 1972), *aff'd* 4 E.R.C. 1815 (D.C. Cir. 1972), *aff'd by an equally divided court sub nom. Fri v. Sierra Club,* 412 U.S. 541(1973). The EPA duly disseminated the first PSD regulations in 1974. *See* 39 Fed. Reg. 42,510 (Dec. 5, 1974). Congress thereafter enacted a PSD program in the Clean Air Act Amendments of 1977. *See* 42 U.S.C. § 7470(1).

As originally enacted, the PSD permit provisions in the Clean Air Act applied only to the "construction" of major emitting facilities. *See* Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, 735 (1977) ("No major emitting facility on which construction is commenced after the date of the enactment of this part, may be constructed in any area to which this part applies unless . . . a permit has been issued . . . ."). However, in November 1977, a few months after the original enactment became effective, Congress passed the "Clean Air Act Technical and Conforming Amendments." Pub. L. No. 95-190, 91 Stat. 1393, 1399 (1977). These amendments added to the "Definitions" section of the PSD provisions in 42 U.S.C. § 7479 a subparagraph that provides: "The term 'construction' when used in connection with any source or facility, includes the modification (as defined in [section 7411(a)]) of any source or facility." *Id.* at 1402. This amendment thus incorporated the NSPS statutory definition of "modification," § 7411(a)(4), into § 7479 of the PSD statute.

The PSD program imposes, *inter alia*, preconstruction review and permit requirements on new or modified sources in areas that have attained or exceeded their air quality standards. 42 U.S.C. § 7475. Unlike the NSPS program, the PSD program does not focus primarily on technology-based controls, but on the "net emissions from an entire plant resulting from construction or modification of one or more emitting sources within the plant." *PEPCo,* 650 F.2d at 518 (emphasis omitted). And so, while NSPS centers on technological controls at an individual pollution-emitting apparatus, PSD fixes on the actual emissions from a site. *See N. Plains Res. Council v. EPA,* 645 F.2d 1349, 1356 (9th Cir. 1981) ("The NSPS program is . . . equipment oriented. On the other hand, the PSD program . . . is . . . site oriented.").

The EPA promulgated regulations under the PSD

provisions of the statute in 1978, *see* 43 Fed. Reg. 26,380 (June 19, 1978), and amended them in 1980, *see* 45 Fed. Reg. 52,676 (Aug. 7, 1980). Under the 1980 PSD regulations, a plant cannot engage in a "major modification" of equipment without first undergoing the EPA's permit process and acquiring a permit. 45 Fed. Reg. 52,676. The EPA's PSD regulations define a "major modification" as "any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act." 40 C.F.R. § 51.166(b)(2)(i) (1987).[1] A "net emissions increase" is "any increase in actual emissions from a particular physical change or change in the method of operation" of a unit. 40 C.F.R. § 51.166(b)(3)(i). The PSD regulations measure emissions increases relative to a baseline calculation of "actual emissions," i.e., "the average rate, in tons per year, at which the unit actually emitted" the regulated pollutant for, usually, the two years prior to date of measurement, "using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period." 40 C.F.R. § 51.166(b)(21)(ii).

II.

A.

Duke Energy's eight plants in the Carolinas include thirty coal-fired generating units that were placed in service between 1940 and 1975. Each unit contains, as one of its

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[1] The 1980 regulations, which the parties agree control the projects at issue here, were recodified in the 1987 Code of Federal Regulations. None of the relevant PSD or NSPS provisions were revised during the period pertaining to this dispute. All subsequent references herein are to the 1987 C.F.R. unless otherwise noted.

three major components, a boiler, which is a large structure from six-to twenty-stories tall containing thousands of steel tubes. The tubes are arranged into sets of tube assemblies, including economizer tubes, in which water is initially heated; furnace waterwall tubes, in which water evaporates to steam; superheater tubes, in which the temperature of the steam is raised before being released into a turbine; and reheater tubes, in which steam released from the turbine is reheated and returned to the turbine.

Between 1988 and 2000, as part of a plant modernization program, Duke Energy engaged in twenty-nine projects on the coal-fired generating units, most of which consisted of replacing and/or redesigning one or more of the boiler tube assemblies. These projects would both extend the life of the generating units and allow the units to increase their daily hours of operation. Duke Energy did not apply for or acquire new permits from the EPA for these projects, some of which, according to the Government, cost "more than seven times the original cost of the unit." Brief of United States at 14.

In December 2000, at the direction of the Administrator of the EPA, the Attorney General brought this enforcement action against Duke Energy, alleging that the life-extension projects violated, *inter alia*, the Clean Air Act's PSD provisions. In September 2001, the district court granted Environmental Defense, the North Carolina Sierra Club, and the North Carolina Public Interest Research Group Citizen Lobby/Education Fund leave to intervene as plaintiffs, and these groups filed a complaint against Duke Energy alleging similar violations.

The EPA and the Intervenors maintain that these life-extension projects constitute "major modifications" of Duke Energy's furnaces as defined in the PSD statutory and regulatory provisions – that is, physical changes leading to a

significant net emissions increase – and thus Duke Energy was required to obtain permits for them. The EPA does not contend that the post-project hourly rate of emissions increased. Rather, it argues that the PSD requires measurement of the net emissions increase by using an "actual-to-projected-actual" test, comparing the actual pre-project emissions from a unit to the projected post-project emissions, which takes into account a unit's ability to operate for more hours. Because the Duke Energy projects enable the units to operate for more hours each day, they will lead to an increase in actual yearly emissions.

Duke Energy counters that its projects do not constitute modifications subject to PSD because they did not increase the units' levels of emissions. The company maintains that, under the PSD program, a net emissions increase will result only if there is an increase in the hourly rate of emissions. Because none of its projects increased a unit's hourly capacity to emit pollution (but increased only the number of hours the unit could operate), the projects did not increase emissions from pre-project levels, and so, according to Duke Energy, it did not have to obtain permits.

B.

The district court agreed with Duke Energy. It held that a modification subject to PSD exists only if there is a post-project increase in the hourly rate of emissions from a unit. *Duke Energy Corp.*, 278 F. Supp. 2d at 640.[2] In

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[2] Duke Energy asserted in the alternative that its projects constitute maintenance, repair and replacement that is routine in the utility industry and, for this reason, were exempt from the permit requirements. *See* The EPA and the Intervenors disagreed, contending that this regulatory exemption only applies to repairs and 40 C.F.R. 51.166(b)(2)(iii)(a).

reaching this conclusion, the district court relied on the language of the PSD regulations, "contemporaneous interpretations" of the regulations by the EPA, and "the statutory language incorporating the NSPS concept of modification into PSD." *Id.*

One regulation promulgated by the EPA pursuant to the PSD statute, 40 C.F.R. § 51.166(b)(2)(i), characterizes a "major modification" as "any physical change in or change in the method of operation . . . that would result in a significant net emissions increase"; another, 40 C.F.R. § 51.166(b)(2)(iii)(f), excludes "an increase in the hours of operation or in the production rate" from the definition of "physical change or change in the method of operation." Reading these two provisions in conjunction, the district court determined that an emissions increase traceable to increased hours of operation cannot trigger the PSD provisions because an increase in hours is not a physical change. Put another way, because increased hours are not a physical change under the PSD regulations, calculation of post-project net emissions cannot take into account increased hours of operation, but rather must be based on pre-project hours of operation and rates of production. Therefore, the court concluded, only if the hourly rate of emissions increases can there be a net emissions increase under the PSD regulations. *Duke Energy,* 278 F. Supp. 2d at 640-41.

The district court recognized that the EPA interpreted

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replacements routine within the life of a generating unit and, therefore, Duke Energy's life-enhancing projects did not qualify for this exemption. The district court again agreed with Duke Energy's interpretation, but held that there was insufficient evidence to grant summary judgment to Duke Energy on this claim. *Duke Energy,* 278 F. Supp. 2d at 638. Given our resolution of this case, we need not reach this question.

its PSD regulations differently, excluding a much smaller group of projects from the definition of "major modification." The EPA would exclude only those projects that increase hours of operation and involve *no* construction. *Id.* at 641. According to the interpretation pressed by the EPA, whenever there is an increase "in utilization coupled with a physical change, any increase in hours of operation . . . may be considered in the emissions calculus." *Id.* The district court concluded that it could not defer to the EPA's interpretation because in addition to being, in the court's view, belied by the plain language of the PSD regulations, the present EPA interpretation was "clearly contrary to earlier [EPA] interpretations" of the regulations. *Id.* Specifically, the court noted that "immediately after the promulgation of the PSD regulations in 1980, the EPA's Director of the Division of Stationary Source Enforcement . . ., Edward E. Reich, confirmed in two separate applicability determinations that the requirements of PSD would be implicated only by an increase in the hourly rate of emissions." *Id.*

Finally, the court determined that its interpretation of the PSD regulation was "also consistent with the NSPS [statutory] definition of 'modification'" found in 42 U.S.C. § 7411(a), "which was incorporated by explicit reference into PSD" in 42 U.S.C. § 7479(2)(C) (defining "construction" to include "the modification (as defined in section 7411(a) . . .) of any source or facility"). *Id.* at 642. The interpretation of PSD regulations urged by the EPA in this suit would, the district court concluded, be "inconsistent with the congressional design of defining PSD construction in terms of NSPS modification and should therefore be accorded little deference." *Id.* at 643.

After resolution of this legal issue, the parties stipulated that the Duke Energy projects would not result in an increase in the hourly rate of emissions. The court then entered summary judgment for Duke Energy.

III.

In cases in which an agency"s interpretation of its regulations are at issue, a court engages in a modified *Chevron* analysis. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council,* 467 U.S. 837 (1984); *United States v. Deaton,* 332 F.3d 698, 708-09 (4th Cir. 2003). First, as in the usual *Chevron* analysis, a court must determine "whether Congress has directly spoken to the precise question at issue." *Chevron,* 467 U.S. at 842. "The judiciary is the final authority on issues of statutory construction" and "if a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n.9. Only if the statute is silent or ambiguous on the point is Congress deemed to have delegated authority to the agency to clarify the point in its regulations. *Id.* at 843-45. Thus, only in such cases does a court examine the regulation itself, determining its legitimate meaning, asking whether the regulation is based on a permissible construction of the statute, and, if so, deferring to it. *See id.* at 843; *Deaton,* 332 F.3d at 708-09.

The EPA and the Intervenors expressly acknowledge that these principles govern our review in the case at hand. *See* Brief of United States at 14-15; Brief of Intervenors at 7-9. They fail to understand, however, that straightforward application of these principles can lead to only one conclusion: affirmance of the judgment of the district court.

This is so because Congress has indeed "directly spoken to the precise question at issue." *Chevron,* 467 U.S. at 842. As the EPA itself concedes, the critical first "question at issue" here is whether the EPA "can interpret the statutory term 'modification' under PSD differently from how EPA interpreted that term" in the NSPS. Brief of United States at

1. As the EPA also concedes, *see id.* at 4, Congress expressly defined "modification" in the NSPS provisions of the Clean Air Act, 42 U.S.C. § 7411(a), and then expressly directed that the PSD provisions of the Act employ this same definition. *See* 42 U.S.C. 7479(2)(C) (providing that "construction" in the PSD includes "modification . . . as defined in section 7411(a)"). When Congress mandates that two provisions of a single statutory scheme define a term identically, the agency charged with administering the statutory scheme cannot interpret these identical definitions differently. Thus, because Congress mandated that the PSD definition of "modification" be identical to the NSPS definition of "modification," the EPA cannot interpret "modification" under the PSD inconsistently with the way it interprets that term under the NSPS.[3]

Common sense would seem to dictate this result. Supreme Court precedent certainly does. *See Rowan Cos. v. United States,* 452 U.S. 247 (1981). In *Rowan*, the Court faced a situation strikingly similar to the one at hand, and held that when Congress itself provided "substantially identical" statutory definitions of a term in different statutes, the agency charged with enforcing the statutes could not interpret the statutory definitions "differently." *Id.* at 257.[4]

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[3] Since Congress has "directly spoken to the precise question at issue . . ., that is the end of the matter." *Chevron, 467 U.S. at 842*. A court need not, indeed cannot, go further. Thus, the language and various interpretations of the PSD regulations, on which the district court partially based its holding and which the parties exhaustively discuss, are largely irrelevant to the proper analysis of this case.

[4] Because none of the parties or the thirty amici cited *Rowan* in their original briefs or reply briefs, we requested supplemental briefing addressing the case. Predictably (but inexplicably in view of its original failure to cite *Rowan)*, Duke Energy asserts that *Rowan* strongly supports its

The question presented in *Rowan* was whether the Commissioner of the Internal Revenue Service could interpret the statutory term "wages" differently for, on the one hand, the Federal Insurance Contributions Act ("FICA") and the Federal Unemployment Tax Act ("FUTA"), and, on the other, the statute governing income-tax withholding. *Id.* at 250. Congress had defined the term "wages" in these statutes in substantially the same language: for both FICA and FUTA, "wages" were defined as "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash"; for income tax withholding, "wages" were defined as "all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash." *Rowan*, 452 U.S. at 249 n.4.[5] The Commissioner, however, issued regulations interpreting "wages" under FICA and FUTA to include the value of meals and lodging provided to employees for the convenience of the employer, and "wages" under the income-tax withholding statute to exclude this value. *See Rowan*, 452 U.S. at 250.

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position. More significantly, although the United States and Intervenors attempt to counter *Rowan* in various ways (which we address within), they do not contend that the *Rowan* analysis is no longer good law.

[5] In 1983, Congress amended two of the statutes at issue in *Rowan*. *See* Pub. L. No. 98-21 § 327(b)(1), 97 Stat. 65, 127 (1983) (adding to 26 U.S.C. § § 3121(a)(21) and 3306(b)(17) a paragraph stating, "Nothing in the regulations prescribed for purposes of . . . income tax withholding . . . which provides an exclusion from 'wages' as used in such chapter shall be construed to require a similar exclusion from 'wages' in the regulations prescribed for purposes of this chapter").

In holding the Commissioner's interpretation impermissible, the Court relied on the plain language of the statutes and their legislative history. First, the Court noted that when Congress enacted the precursors to FICA and FUTA as part of the Social Security Act of 1935, it chose "wages" as the basis for employer taxation and then statutorily defined the term. *Id.* at 255. Similarly, seven years later, when Congress enacted the original income-tax withholding statute, it chose "wages" as the basis for taxation and statutorily defined the term "in substantially the same language that it used in FICA and FUTA." *Id.* The *Rowan* Court held that, "in view of this sequence of consistency, the plain language of the statute is strong evidence that Congress intended 'wages' to mean the same thing under FICA, FUTA, and income-tax withholding." *Id.*[6] The Court then examined the statutes' history, finding indications that Congress intended to "coordinate the income-tax withholding system

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[6] We note that the standards of judicial review followed in *Rowan* differ somewhat from those established three years later in *Chevron*. The most significant change for the case at hand is that *Chevron* abolished judicial deference to agency interpretation of a statute in step one. *See* John F. Coverdale, *Chevron's* Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings After Mead, 55 *Admin. L. Rev.* 39, 77 (2003); *cf. United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); *Christensen v. Harris County*, 529 U.S. 576, 582-83 (2000). This difference does not in any way lessen the precedential value of *Rowan* here. Indeed, if anything, it strengthens *Rowan's* support for our holding because even though in *Rowan* the Court gave some deference to the agency's interpretation of the statutes (rather than examining the statutes *de novo* as *Chevron* step one directs), the Court nevertheless rejected the agency's position that it could interpret very similar statutory language differently.

with FICA and FUTA . . . to promote simplicity and ease of administration," and concluding that "contradictory interpretations of substantially identical definitions do not serve that interest." *Id.* at 257.

The plain language of the Clean Air Act provides even stronger evidence that Congress intended the statutory definitions of "modification" in the PSD and NSPS provisions to be interpreted identically. While Congress used only "substantially the same language" in the statutory definitions at issue in *Rowan,* id. at 255, here Congress mandated that the definition of "modification" in the PSD provisions precisely mirror the definition of "modification" in the NSPS provision. Congress did this by directly incorporating the NSPS definition, which it had enacted in 1970, into the PSD provisions, which it enacted seven years later. *See* Pub. L. No. 95-190, 91 Stat. 1393, 1402 (1977) ("The term 'construction' when used in connection with any source or facility, includes the modification (as defined in [section 7411(a)]) of any source or facility."); 42 U.S.C. § 7479(2)(C).

Moreover, as in *Rowan*, the legislative history of the statutes at issue here does not in any way suggest that Congress intended these identical statutory definitions to receive different interpretations. Notwithstanding the EPA's contentions to the contrary, the fact that the PSD definition of modification became part of the statute through "Technical and Conforming Amendments" does not change the fact that the definition is a statutory enactment, entitled to be treated as such. *See United States v. R.L.C.,* 503 U.S. 291, 305 n.5 (Opinion of Souter, J.) ("[A] statute is a statute, whatever its label," and must be interpreted using "the usual tools of statutory construction."). Indeed, the expressed intent in the congressional summary of the legislative amendments to "conform" the definition of modification in the PSD provisions "to usage in other parts of the Act," 123 Cong. Rec. 36,253 (Nov. 1, 1977), indicates congressional concern

with the same sort of simplicity and consistency that the *Rowan* Court discerned from the legislative history examined there. As the Court explained in *Rowan*, "it would be extraordinary for a Congress pursuing this interest to intend, without ever saying so, for identical definitions to be interpreted differently." 452 U.S. at 257.[7]

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[7] Confronted with FICA and FUTA regulations that directly contradicted established rules developed under income taxation, *see Rowan,* 452 U.S. at 258, the Court invalidated the FICA and FUTA regulations, *id.* at 263. In contrast, notwithstanding the contentions of the United States and Intervenors in their supplemental briefs, no question as to the validity of the PSD regulations is (or could be, *see* 42 U.S.C. § 7607(b)) presented here. Unlike the FICA and FUTA regulations at issue in *Rowan*, the PSD regulations can be interpreted consistently with pre-existing principles – the NSPS regulations – as the district court demonstrated and as the EPA's Director of the Division of Stationary Source Enforcement twice opined shortly after promulgation of the PSD regulations. Our choice of this interpretation of the PSD regulations – as required under the statute – over the EPA's interpretation is not an invalidation of those regulations. The PSD regulations remain fully intact and enforceable and, indeed, could even be enforced as the EPA urges provided that, as long as the PSD and NSPS statutes define "modification" identically, the NSPS regulations are similarly interpreted and enforced. Thus, the only question that we need resolve is one properly before us, indeed one that EPA itself poses, i.e., whether it "can interpret the statutory term modification under PSD differently from how" it has interpreted that term under NSPS. *See* Brief of United States at 1, 22-30; Reply Brief of United States at 2. Given that the EPA expressly asks that we resolve this question, we have difficulty understanding its suggestion in its supplemental brief that Duke Energy "waived" resolution of this question.

The EPA points to Senator Muskie's statement that it was "not the purpose of these amendments to re-open substantive issues" in the Act, 123 Cong. Rec. 36,252, as evidence that Congress was merely using an expedient method to correct the inadvertent omission of the word "modification" from the PSD provisions. To the extent that Senator Muskie's remarks demonstrate Congress' intent, *see Runnebaum v. NationsBank of Maryland, N.A.*, 123 F.3d 156, 169 n.7 (4th Cir. 1997) (en banc), they do not support the EPA's position. The assertion that the Technical and Conforming Amendments were not "designed to resolve issues that were not resolved" in the debate and passage of the Act, *see* 123 Cong. Rec. 36,252 (statement of Sen. Muskie), says nothing about whether Congress had previously resolved the issue of whether the interpretation of "modification" was to be congruent under the PSD and NSPS statutory provisions.

The EPA and Intervenors also emphasize the "vital differences" between PSD and NSPS. Brief of United States at 22; *see also id.* at 4-6; Brief of Intervenors at 13-21. We do not ignore or minimize those differences. Although both statutes are part of the Clean Air Act and designed to serve its purpose "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population," 42 U.S.C. § 7401(b)(1), they address somewhat different problems. PSD exists primarily to prevent significant deterioration of ambient air quality in areas meeting clean air standards, *see* 42 U.S.C. § 7470(1), while NSPS requires new sources to implement particular technologies to limit their own emissions. *Id.* § 7411. These differences have led us and other courts to approve different regulatory definitions for an identical statutory term in the two statutes. In *PEPCo*, for example, we held that "significant differences between the PSD and NSPS programs" justified a different interpretation of the statutory

term "stationary source." 650 F.2d at 518. But in *PEPCo*, although Congress had defined the term "stationary source" in the NSPS provisions, *see* 42 U.S.C. § 7411(a)(3), it had *not* defined that term in the PSD provisions. Thus, while in *PEPCo* both statutes contained the same *term*, the statutes did not *define* that term in the same manner; nor was the use of the term in the PSD provisions linked to the statutory definition of the term in the NSPS provisions. Similarly, in *Northern Plains Resource Council*, the Ninth Circuit allowed the EPA to interpret the statutory term "commenced" differently in the NSPS and PSD regulations. 645 F.2d at 1357. But again, although one statute – there the PSD provisions – defined the term, *see* 42 U.S.C. § 7479(2)(A), the other – the NSPS provisions – did *not*. And, Congress had not linked the PSD definition of the term to its use in the NSPS provisions of the statute.

PEPCo and *Northern Plains Resource Council* illustrate the principle that the same word or phrase will generally be presumed to have the same meaning when used in different parts of the statute, but this "presumption of the uniform usage . . . relents" when there is "a variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *Gen. Dynamics Land Sys., Inc. v. Cline,* 540 U.S. 581 (2004) (internal quotation marks and citation omitted). Thus, in *PEPCo* and *Northern Plains Resource Council*, the difference in purpose between the NSPS and PSD programs justified the conclusion that the same words had different meanings in the two sections of the statute. *See N. Plains Res. Council,* 645 F.2d at 1355-56.

In the case before us, however, the presumption of uniform usage has become effectively irrebutable because Congress' decision to create identical statutory definitions of the term "modification" has affirmatively mandated that this term be interpreted identically in the two programs. The

different purposes of the NSPS and PSD programs cannot override that mandate. Neither the United States nor the Intervenors have cited a single case in which any court has held that identical statutory *definitions* can be interpreted differently by the agency charged with enforcement of the statute. Moreover, in *Rowan* the Supreme Court expressly rejected the argument, which was successful in the Fifth Circuit, that the different purposes of FICA/FUTA and income-tax withholding justified the different regulatory interpretations of the same statutory definition. *See Rowan*, 452 U.S. at 250, 257-58. The *Rowan* Court concluded that to permit the Commissioner to interpret the same statutory terms differently would "fail to implement the congressional mandate in a consistent and reasonable manner." *Id.* at 253.

So it is here. Congress mandated that the PSD statute incorporate the NSPS statutory definition of "modification." No one disputes that prior to enactment of the PSD statute, the EPA promulgated NSPS regulations that define the term "modification" so that only a project that increases a plant's *hourly* rate of emissions constitutes a "modification." The EPA must, therefore, interpret its PSD regulations defining "modification" congruently. Of course, this does not mean that this regulatory interpretation must be retained indefinitely. The EPA retains its authority to amend and revise this and other regulations "through exercise of appropriate rulemaking powers." *Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 100-01 (1939) (noting that "the contrary conclusion would . . . drastically curtail the scope and materially impair the flexibility of administrative action"); *McCoy v. United States*, 802 F.2d 762, 766 (4th Cir. 1986). Indeed, the parties point out that the EPA has already amended some of the regulations at issue here. *See* Brief of Duke Energy at 62-63; Reply Brief of United States at 17-18. As long as Congress mandates that "modification" be defined identically in the NSPS and PSD statutes, however, EPA must interpret that term in a consistent manner in the NSPS and

PSD regulations.

IV.

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

United States Court of Appeals,
Fourth Circuit

UNITED STATES OF AMERICA, Plaintiff-Appellant,
ENVIRONMENTAL DEFENSE; NORTH CAROLINA SIERRA CLUB; NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP CITIZEN LOBBY/EDUCATION FUND, Intervenors/Plaintiffs-Appellants,
v.

DUKE ENERGY CORPORATION, Defendant-Appellee.

No. 04-1763.

On Petition for Rehearing and Rehearing En Banc

Filed August 30, 2005

The Appellants' petitions for rehearing and rehearing en banc were submitted to this Court. As no member of this Court or the panel requested a poll on the petitions for rehearing en banc, and

As the panel considered the petitions for rehearing and is of the opinion that they should be denied,

IT IS ORDERED that the petitions for rehearing and rehearing en banc are denied.

Entered for a panel composed of Judge Luttig, Judge Motz, and U. S. District Judge Wilson.

For the Court
/s/ Patricia S. Connor

CLERK

United States Court of Appeals,
Fourth Circuit

UNITED STATES OF AMERICA, Plaintiff-Appellant,
ENVIRONMENTAL DEFENSE; NORTH CAROLINA SIERRA CLUB; NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP CITIZEN LOBBY/EDUCATION FUND, Intervenors/Plaintiffs-Appellants,
v.

DUKE ENERGY CORPORATION, Defendant-Appellee.

No. 04-1763.

FILED: May 2, 2005

ORDER

The parties are directed to serve and file in the office of the Clerk, on or before May 9, 2005, supplemental briefs not to exceed five (5) pages addressing the relevance of *Rowan Cos. v. United States*, 452 U.S. 247 (1981) to the above entitled case.

For the Court
/s/ Patricia S. Connor

CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,
Plaintiff and Counter-Defendant, and
ENVIRONMENTAL DEFENSE; NORTH CAROLINA SIERRA CLUB; and NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP CITIZEN LOBBY/EDUCATION FUND,
Intervenor- Plaintiffs,

v.

DUKE ENERGY CORPORATION,
Defendant and Counter-Claimant.

Civil No. 1:00CV01262

MEMORANDUM OPINION

BULLOCK, District Judge:

On December 22, 2000, the Attorney General of the United States acting at the request of the Administrator of the United States Environmental Protection Agency ("EPA") filed this action against Defendant Duke Energy Corporation ("Duke Energy"). The EPA alleges that Duke Energy made modifications to and operated eight coal-fired electrical generating plants in North Carolina and South Carolina in violation of the Clean Air Act (the "CAA" or "Act"), 42 U.S.C. § 7401 *et seq.*, specifically the Prevention of Significant Deterioration ("PSD") provisions of the Act, 42 U.S.C. §§ 7470-92, and for violations of State Implementation Plans approved under the Act for the States of North Carolina and South Carolina. On May 8, 2001, the

following groups, Environmental Defense, North Carolina Sierra Club, and North Carolina Public Interest Research Group Citizen Lobby/Education Fund (hereinafter collectively referred to as "Intervenor-Plaintiffs") moved to intervene as plaintiffs. On September 6, 2001, the court granted these groups' motion to intervene, *United States v. Duke Energy Corp.*, 171 F. Supp. 2d 560 (M.D.N.C. 2001), and on the same date the Intervenor-Plaintiffs filed a complaint against Duke Energy alleging similar violations as those in the original complaint.

After a lengthy discovery period, which produced approximately 4.6 million pages of documents, extensive discovery disputes, and numerous pretrial motions, the parties now move for summary judgment. The EPA, Intervenor-Plaintiffs, and Duke Energy have submitted lengthy briefs, accompanied by thousands of pages of exhibits, and the motions for summary judgment are ripe for resolution. For the reasons that follow, the court will deny Duke Energy's motion for summary judgment, grant in part and deny in part the EPA's motion for partial summary judgment in which Intervenor-Plaintiffs join, deny Intervenor-Plaintiffs' motion for partial summary judgment on Duke Energy's "fair notice" defense, and deny Duke Energy's motion for partial judgment on the pleadings.

FACTS[1]

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[1] The issues the court will resolve at this stage involve questions of law, i.e., (1) whether the correct standard for determining routine maintenance, repair, and replacement is "routine in the industry" or "routine at a particular generating unit"; (2) whether a post project net emissions increase should be calculated assuming constant hours of operation or increased utilization; and (3) whether certain claims for statutory penalties and injunctive relief are barred by the

Duke Energy is an international energy company headquartered in Charlotte, North Carolina, and has provided electricity to North Carolina and South Carolina since the early 1900s. Duke Energy's system of electrical generating facilities includes nuclear, hydroelectric, gas-fired combustion turbine, and coal-fired generating plants. Duke Energy currently operates thirty coal-fired electric generating units at eight plants located throughout North Carolina and South Carolina. It is these coal-fired units which are the subject of this litigation.

Duke Energy's coal-fired generating units were placed in service between 1940 and 1975. These units have net rated generating capacities from 38 MW (for some of the oldest units) to 1120 MW (for the newest units). Each unit of a coal-fired generating plant consists of three primary components: the boiler, the steam turbine, and the electric generator.

The boiler on these units is a large, building-like structure ranging from six to twenty stories tall and contains thousands of steel tubes in which water is heated to superheated steam with temperatures in excess of 900 °F. While the specific design of each boiler at issue may differ slightly, in general the boiler consists of collections of tube assemblies, including the economizer tubes, where water is initially heated; the furnace waterwall tubes, where water evaporates to steam; the superheater tubes, where the temperature of the steam is raised just before the steam exits the boiler and reaches the turbine; and the reheater tubes, where steam from the turbine is reheated and returned to the turbine. The furnace waterwall tubes form the walls of the

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statute of limitations. Because these legal determinations are not necessarily dependent on any particular facts, only a general overview of the facts giving rise to this action is provided.

boiler and provide an envelope for coal combustion while also absorbing heat.

A coal-fired unit operates by converting the chemical energy contained in coal into electricity. Pulverized coal is fed into the boiler and combusted. "Flue gas" is created with temperatures of up to 3000 °F when the ground coal is ignited in the boiler's furnace. The flue gas, which contains sulfur dioxide, ash particles or particulate matter, and nitrogen oxides, passes around the tubes and tube assemblies. This combustion process heats water that flows continuously through the tubes and tube assemblies making up the walls, roof, and floor of the boiler. The water in the tubes is thus converted to high pressure steam, which then flows through additional panels or assemblies of tubes to become superheated. The superheated steam enters the turbines where the pressure of the steam against a series of blades turns the turbine shaft. The turbine shaft turns the shaft of a generator, which transforms the mechanical energy into electric energy. After passing through the turbine, the steam is converted to water in condensers and pumped through feedwater heaters back to the economizer where it begins the entire steam cycle process again. Once the flue gas used to heat the water passes through the boiler, it passes through pollution control devices, if any, and exits through a stack into the atmosphere.

The EPA alleges that Duke Energy modified and subsequently operated its seven coal-fired generating plants in North Carolina and its one coal-fired generating plant in South Carolina in violation of the PSD provisions of the CAA. The EPA's allegations stem from twenty-nine projects Duke Energy engaged in between 1988 and 2000.[2] (Compl. at

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[2] The following plants, units, and projects are the subject of this lawsuit: (1) Allen, Unit No. 5, 2000 Project; (2) Allen, Unit No. 5, 1996 Project; (3) Allen, Unit No. 4, 1996 Project; (4) Allen, Unit No. 4, 1998 Project; (5) Allen, Unit No. 2,

PP 31-292.) A detailed description of the work performed at each plant and unit would be lengthy and ultimately unnecessary.[3] However, the majority of the projects consisted

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1988 Project; (6) Allen, Unit No. 1, 1989 Project; (7) Belews Creek, Unit No. 2, 1999 Project; (8) Belews Creek, Unit No. 2, 1996 Project; (9) Belews Creek, Unit No. 1, 2000 Project; (10) Buck, Unit No. 5, 1991 Project; (11) Buck, Unit No. 4, 1994 Project; (12) Buck, Unit No. 3, 1994 Project; (13) Marshall, Unit No. 4, 1990 Project; (14) Marshall, Unit No. 3, 1999 Project; (15) Marshall, Unit No. 2, 1989 Project; (16) Marshall, Unit No. 2, 1996 Project; (17) Cliffside, Unit No. 2, 1993 Project; (18) Cliffside, Unit No. 3, 1990 Project; (19) Cliffside, Unit No. 4, 1990 Project; (20) Cliffside, Unit No. 5, 1992/1995 Project; (21) Cliffside, Unit No. 1, 1993 Project; (22) Dan River, Unit No. 3, 1988 Project; (23) Allen, Unit No. 3, 1994 Project; (24) W.S. Lee, Unit No. 3, 1989-90 Project; (25) Riverbend, Unit No. 4, 1990 Project; (26) Riverbend, Unit No. 6, 1991 Project; (27) Riverbend, Unit No. 7, 1992 Project; (28) Buck, Unit No. 6, 1990 Project; and (29) Marshall, Unit No. 1, 1992 Project.

[3] The only unit that warrants a detailed description of the work performed during the alleged "modification" is Buck, Unit No. 4 ("Buck 4"), which the EPA has moved for summary judgment on. The extent and scope of the Buck 4 project, however, is disputed by Duke Energy and the EPA. The EPA describes the work performed at Buck 4 as involving the replacement of the "entire boiler backpass (including the screen tubes, generating banks, and superheater) at Buck 4 (Boiler 7) with a completely redesigned configuration." (EPA Mem. Supp. Mot. Partial Summ. J. at 7.) In replacing the entire backpass, Duke Energy installed approximately 1,070 new tubes or approximately 7,132 feet of new tubing. In addition, the EPA contends that Duke Energy "replaced all of the waterwall tubes, floor screen tubes, and roof tubes." (*Id.* at 8.) This work involved

of replacement and/or redesign of one or more of four sets of boiler tube assemblies--economizers, portions of waterwalls, superheaters, and reheaters. (*Id.*)

In 1984, Duke Energy placed several of the units at issue, including Buck 4, into "Extended Cold Storage" ("ECS").[4] During the period of ECS, dehumidified air was circulated through the water, steam, air, and gas passages in order to protect the units. The reason behind Duke Energy's decision to place its units in ECS is disputed. Duke Energy contends that it placed these units into ECS because it increased its system generating capacity by adding additional generating plants, which in turn led to less use of its coal-fired units.[5] Duke Energy also asserts that when it placed these

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the installation of approximately 10,700 feet of tubing. Duke Energy asserts that its boiler backpass work did not involve the replacement of the entire backpass. According to Duke Energy, the backpass work involved "replacing tubular pressure parts rather than the heavy-walled components such as the drums and headers." (Duke Energy Am. Br. Opp'n Mot. Partial Summ. J. at 3.) Furthermore, Duke Energy takes exception to the EPA's description that "all the waterwall tubes" were replaced. Duke Energy contends that the side waterwall header supply tubes were not removed and replaced. (*Id.* at 3-4.)

[4] These project were: Allen, Unit Nos. 1 & 2; Buck, Unit Nos. 3, 4, & 5; Cliffside, Unit Nos. 1, 2, 3, & 4; Dan River, Unit No. 3; Riverbend, Unit Nos. 4, 6, & 7.

[5] Beginning in the mid-1970s, Duke Energy brought online Belews Creek, Unit Nos. 1 & 2 (2200 MW of coal-fired capacity), and Oconee, Unit Nos. 1, 2 & 3 (2600 MW of nuclear capacity). During the 1981-1986 period, Duke Energy added four more nuclear units, McGuire, Unit Nos. 1 & 2, and Catawba, Unit Nos. 1 & 2 (4800 MW of nuclear

units into ECS, it made definitive plans for preserving and conditioning these units while in ECS so that they could be returned to service when demand dictated. (Knudsen Decl. P 5 (Duke Energy Ex. 59); Kinsey Decl. P 6 (Duke Energy Ex. 69).) The EPA, however, contends that Duke Energy removed these units from service due to their advanced age and condition. William S. Lee, Chairman of the Board and CEO of Duke Energy, testified before the South Carolina state public utility regulators in 1985 that the units placed into ECS were "no longer reliable because of their age and because their use as peaking units in the past few years had stressed the units, which originally were designed for base load use ... Historically, units of this age and condition would be retired and scrapped." (Lee Test. at 90 (EPA Ex. 13).) Lee further explained that Duke Energy had plans to rehabilitate the units, but if it continued to operate the units in their current condition they would "simply fall apart, or damage themselves in a very serious way." (Lee Test. at 41 (EPA Ex. 15).)

Shortly after placing its units into ECS, Duke Energy developed a "Plant Modernization Program" ("PMP"). Based on information gathered during inspection of the units, Duke Energy developed plans to address a variety of maintenance, repair, and replacement needs. According to Duke Energy, the purpose for PMP was "to conduct maintenance and upgrade to selected fossil generating units so that they operate safely, reliably and cost effectively for an additional 20 years." (Plant Modernization Project Review (Apr. 24, 1989) at 2 (EPA Ex. 23).) According to Duke Energy's "PMP Strategy Statement," the "extended operating life of the rehabilitated units is a cost-effective alternative to the addition of new capacity." (Mem. from Parker to Owen, *et al.* (Feb. 13, 1986) (EPA Ex. 25).)

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capacity).

Any work performed at the units not placed into ECS was undertaken during regularly scheduled planned turbine outages.[6] Regularly scheduled outages typically occur at a unit every forty-eight to eighty-four months depending on the particular unit's condition and other system requirements.

On December 22, 2000, approximately twelve years after the completion of Duke Energy's earliest PMP project, the United States on behalf of the EPA filed the present suit against Duke Energy. The EPA contends that Duke Energy's projects at its coal-fired units were "modifications" and thus triggered the requirements of PSD. A unit that is subject to PSD must obtain a preconstruction review and permit. If it is determined during this review that a proposed project will modify an existing unit and thereby increase the level of emissions, the operator of the unit is required to install the best available control technology for pollutants emitted by the particular unit.

As noted previously, Duke Energy, the EPA, and Intervenor-Plaintiffs have all moved for summary judgment or partial summary judgment. Duke Energy seeks summary judgment dismissing all claims of the EPA and Intervenor-Plaintiffs. It argues that the EPA cannot establish that the projects undertaken at its coal-fired generating units were non-routine maintenance, repair, and replacement activities or

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[6] These projects were: Allen, Unit No. 3, 1994 Project; Allen, Unit No. 4, 1996 & 1998 Projects; Allen Unit No. 5, 1996 & 2000 Projects; Belews Creek, Unit No. 1, 2000 Project; Belews Creek, Unit No. 2, 1996 & 1999 Projects; Buck, Unit No. 6, 1990/1991 Project; Cliffside, Unit No. 5, 1992/1995 Project; W.S. Lee, Unit No. 3, 1989/1990 Project; Marshall, Unit No. 1, 1992 Project; Marshall, Unit No. 2, 1989 & 1996 Projects; Marshall, Unit No. 3, 1999 Project; Marshall, Unit No. 4, 1990 Project.

that the projects caused a net emissions increase.

As to the issue of whether Duke Energy's projects were routine maintenance, repair, and replacement, Duke Energy contends that the established interpretation of what is routine "'must be based on the evaluation of whether that type of equipment has been repaired or replaced by sources within the relevant industrial category.'" (Duke Energy Br. Supp. Mot. Summ. J. at 35 (quoting 57 Fed. Reg. 32,314, 32,326 (July 21, 1992)).) Under this standard, according to Duke Energy, its component repair and replacement projects were not modifications because they consisted of repairs and replacements that are common in the utility industry.

Duke Energy similarly argues that its component repair and replacement projects were not modifications because they did not increase the units' levels of emissions. Duke Energy contends that under the 1980 PSD regulations, a net emissions increase will result only if there is an increase in the hourly rate of emissions. It acknowledges that for purposes of PSD, emissions are measured in annual tons per year. Yet Duke Energy argues that in calculating post-project actual emissions, the regulations require that the hours and conditions of operation be held constant. Accordingly, because none of the projects increased a unit's hourly capacity to emit pollution, there is no increase in emissions from pre-project levels.

The EPA and Intervenor-Plaintiffs move for partial summary judgment on similar grounds. They, too, seek a legal determination as to the appropriate standard for determining what is routine maintenance, repair, and replacement. The EPA and Intervenor-Plaintiffs argue that the standard is not the industry or source category standard advanced by Duke Energy. Rather, they contend that whether a particular project is routine maintenance, repair, and replacement must be determined based on whether that type

of project is routine within the life of a generating unit. The EPA and Intervenor-Plaintiffs also request partial summary judgment that the "comprehensive renovation" at Buck 4 was a physical change that does not qualify as routine maintenance and repair. Furthermore, the EPA and Intervenor-Plaintiffs move for partial summary judgment as to Duke Energy's defense that it did not have fair notice of the EPA's interpretation of the PSD regulations.

The EPA and Intervenor-Plaintiffs, similar to Duke Energy, also seek a legal determination as to how post-project emissions should be calculated. The EPA argues that PSD requires that the source predict annual emissions increases prior to construction. In predicting an increase in emissions, the EPA asserts, the source operator must consider the hourly rate of emissions and the increased utilization of the unit following the project. As to Buck 4 specifically, the EPA argues that because the project enabled Duke Energy to utilize a previously inoperable unit, the project resulted in a net increase in emissions.

Finally, the EPA and Intervenor-Plaintiffs seek partial summary judgment that the claims for penalties and injunctive relief with respect to modifications that were completed more than five years before this suit was filed are not barred by the statute of limitations. Duke Energy previously moved for partial judgment on the pleadings arguing that such claims were barred by the statute of limitations. The court deferred ruling on Duke Energy's motion in order to allow the record to develop more fully. Duke Energy's motion for partial judgment on the pleadings, as well as the EPA and Intervenor-Plaintiffs' motion for partial summary judgment, is ripe for resolution.

DISCUSSION

I. Standard of Review

Summary judgment must be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the burden of persuasion on the relevant issues. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). The non-moving party may survive a motion for summary judgment by producing "evidence from which a [fact finder] might return a verdict in [its] favor." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 257 (1986). When the motion is supported by affidavits, the non-moving party must set forth specific facts showing that there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(e); see *also Cray Communications, Inc. v. Novatel Computer Sys., Inc.,* 33 F.3d 390, 393-94 (4th Cir. 1994) (moving party on summary judgment motion can simply argue the absence of evidence by which the non-movant can prove its case). In considering the evidence, all reasonable inferences are to be drawn in favor of the non-moving party. *Anderson,* 477 U.S. at 255. However, "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the [fact finder] could reasonably find for the plaintiff." *Id.* at 252.

In general, reviewing courts typically grant substantial deference to the EPA's interpretation of the CAA Amendments and its implementing regulations. The reasoning behind this deferential review is that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 844 (1984). Deference to agency interpretation is particularly appropriate where the subject being regulated is

technical and complex. *Aluminum Co. of Am. v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 390 (1984). An agency's interpretation of its own regulations must be given " "'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)). However, "this standard does not give the EPA unbridled discretion to construe the [CAA] Amendments free from judicial oversight. [The court] must consider whether the EPA's construction comports with its statutory mandate and Congress's intent in enacting clean air legislation." *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 907 (7th Cir. 1990) ("*WEPCO*").

II. Statutory and Regulatory Background

One of the primary purposes of the CAA is to "speed up, expand, and intensify the war against air pollution in the United States with a view to assuring that the air we breathe throughout the Nation is wholesome once again." H.R. Rep. No. 91-1146, at 1 (1970), reprinted in 1970 U.S.C.C.A.N. 5356, 5356. In order to accomplish the congressional objective of "protecting and enhancing the quality of the Nation's air resources," 42 U.S.C. § 7401(b)(1) (1995), Congress directed the EPA to develop National Ambient Air Quality Standards ("NAAQS") which specify the maximum allowable concentrations of air pollutants for different areas of the country. *Id.* § 7409. Based on the levels of pollution established by the EPA, the states were required to develop State Implementation Plans ("SIPs") that defined source-by-source emissions limits so that each state could meet the NAAQS. *Id.* § 7410; *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 66-67 (1975). Areas that meet the NAAQS for a particular pollutant are designated as "attainment" areas and areas that do not meet the NAAQS are designated "non-attainment" areas. 42 U.S.C. § 7407(d) (1995).

As part of the 1970 CAA Amendments, Congress required the EPA to promulgate New Source Performance Standards ("NSPS") in order to regulate and minimize the environmental impact from the emission of air pollutants from "new sources." The NSPS regulates hourly emission rates (expressed as kg/hr) and applies to both newly constructed sources and to "modifications" of existing facilities that create new or increased pollution. Under NSPS, Congress defined "new source" as "any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source." *Id.* § 7411(a)(2) (emphasis added). Congress then defined "modification" as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." *Id.* § 7411(a)(4).

Due to the cost and difficulty of installing new pollution control technologies on existing sources, the EPA provided exemptions from the "modification" rule for certain activities undertaken at already operating sources. The regulations initially provided that "routine maintenance, repair, and replacement shall not be considered physical changes." 40 C.F.R. § 60.2(h)(1) (Duke Energy Ex. 4). This standard was later clarified to mean that a modification shall not include "maintenance, repair, and replacement which the Administrator determines to be routine for a source category." 40 C.F.R. § 60.14(e)(1) (1975) (Duke Energy Ex. 6). The regulations also provided that increases in hours of operation or production rates within the operating design capacity of a facility are not considered modifications. 40 C.F.R. § 60.2(h)(2)(ii) (1971) (Duke Energy Ex. 4); 40 C.F.R. § 60.14(e)(2), (3) (1975) (Duke Energy Ex. 6).

In 1977 Congress again amended the CAA by enacting a program called New Source Review ("NSR"). The NSR had provisions for the protection of areas with relatively clean air, Prevention of Significant Deterioration ("PSD"), and for areas that did not meet certain air quality standards, Non-Attainment New Source Review ("NNSR").[7] PSD was designed to ensure that the air quality of relatively unpolluted areas, i.e., attainment areas, did not decline to the minimum levels permitted by NAAQS due to increases in total annual emissions. To prevent significant deterioration of air quality, operators of regulated sources in attainment areas are required to limit emissions to a "baseline rate" and obtain a permit before constructing or modifying facilities. 42 U.S.C. § 7475(a)(1)(1995).

When Congress enacted the PSD program, it incorporated by explicit reference the NSPS definition of modification into the NSR definition of construction/modification. *Id.* § 7479(2)(C) (PSD) ("The term 'construction' ... includes the modification (as defined in section 7411(a) of this title [NSPS]) of any source or facility."); *id.* § 7501(4) (NNSR) ("The terms 'modifications' and 'modified' mean the same as the term 'modification' as used in section 7411(a)(4) of this title [NSPS]."). The PSD statutory definition incorporated not only the NSPS statutory definition of modification, but also the regulations implementing the NSPS program. A House-Senate Conference Committee report explained the congressional intent "to conform" the NSR definition of modification to the "usage in other parts of the Act." 123 Cong. Rec. H11956,

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[7] PSD applies to emissions increases in attainment areas, while NNSR applies to emissions increases in non-attainment areas. The EPA has alleged violations of PSD because the areas of North Carolina and South Carolina where Duke Energy operates the units at issue are in attainment areas for all relevant pollutants.

3665 (daily ed. Nov. 1, 1977) (Duke Energy Ex. 13). The EPA explained that "the phrase 'usage in other parts of the Act' most probably refers, not only to section 111(a)(4) [NSPS], but also to the EPA regulations implementing section 111 that were in effect at the time." 49 Fed. Reg. 43,211, 43,213 (Oct. 26, 1984) (Duke Energy Ex. 14). In addition, the Director of the Stationary Source Compliance Division, Edward E. Reich, explained:

> The Clean Air Act provides in Section 169(1)(c) that for PSD purposes the term modification shall be defined as that term is defined in Section 111(a) of the Act relating to NSPS. EPA has interpreted this to mean that for PSD purposes Congress intended the term modification to include all exemptions included in the NSPS regulations promulgated under Section 111 of the Act prior to the date of enactment of Section 169.

(Mem. from Reich to Davis (Apr. 21, 1983) at 2 (Duke Energy Ex. 16).

Subsequent to the congressional enactment of NSR, the EPA promulgated regulations for PSD. The regulation at the center of the controversy between the parties is the regulation concerning the term "modification." Under its 1980 PSD regulations, which the parties acknowledge as the controlling regulations, the EPA defined modification as "any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act." 40 C.F.R. § 51.166(b)(2)(i) (1987) (Duke Energy Ex. 21). Accordingly, to trigger the PSD's permitting requirement and the requirement to install pollution controls, two criteria must be satisfied: (1) there must be a "physical change" and (2) there must be a "significant net emissions increase."

The term "physical change" has been interpreted broadly. "The most trivial activities--the replacement of leaky pipes, for example--may trigger the modification provisions if the change results in an increase in the emissions of a facility." *WEPCO*, 893 F.2d at 905. The EPA promulgated under the PSD program regulatory exclusions from the definition of modification using substantially the same terms it used in the NSPS regulations. Specifically, the EPA created an exemption for "routine maintenance, repair, and replacement" ("RMRR"). 40 C.F.R. § 51.166(b)(2)(iii)(a) (1987) (Duke Energy Ex. 21). The meaning and scope to be afforded this exemption is one of the central disagreements between Duke Energy and the EPA. The issue for the court to decide is whether RMRR should be defined relative to an industrial category or to a particular unit. The EPA's PSD regulations also provided that a physical change or change in the method of operation shall not include "an increase in the hours of operation or in the production rate." *Id.* § 51.166(b)(2)(iii)(f).

The second criteria necessary to trigger the PSD's requirements is that the physical or operational change must cause a "significant net emissions increase." Under the PSD regulations, a "net emissions increase" is defined as "any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source." *Id.* § 51.166(b)(3)(i)(a). Unlike NSPS which measures emissions increases based on an hourly rate, PSD measures emissions based on total annual emissions. The second primary issue of disagreement between the parties is the appropriate emissions test that should be employed in calculating the post-project emissions rates.

III. Routine Maintenance, Repair, and Replacement

The court is presented with two different interpretations of the RMRR exemption. As described by the Eleventh Circuit, the "central disagreement between [the utility] and EPA is whether 'routine' should be defined relative to an industrial category or to a particular unit." *Tennessee Valley Auth. v. United States EPA*, 278 F.3d 1184, 1189 n.3 (11th Cir. 2002). The EPA argues that the RMRR exemption requires "a case-by-case determination of whether the activity is routinely performed at an individual unit within the relevant industrial category, considering common-sense factors such as nature and extent, purpose, frequency, and cost," (EPA Mem. Supp. Mot. Partial Summ. J. at 1), and that this has been the EPA's "long-standing interpretation."[8] (*Id.* at 23.) Conversely, Duke Energy asserts that the ""routine' inquiry has as its ultimate purpose the determination of

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[8] The EPA cites two recent decisions, *In re Tenn. Valley Auth.*, CAA Docket No. 00-6, 2000 EPA App. LEXIS 25 (Envt'l Appeals Bd., U.S. EPA Sept. 15, 2000) (EPA Ex. 100), and *Detroit Edison Applicability Determination* (May 23, 2000) (EPA Ex. 101), to strengthen its position that the "routine at an individual unit" standard has consistently been applied. (EPA Mem. Supp. Mot. Partial Summ. J. at 22-23.) Both decisions, however, were issued following the EPA's decision in 1999 to initiate a number of enforcement proceedings. Further, with respect to the order issued in *In re Tenn. Valley Auth.*, the objectivity of this decision has been brought into question because of the failure of the proceedings to comply with the requirements of due process. *TVA v. Whitman*, 2003 U.S. App. LEXIS 12830, 2003 WL 21452521 (11th Cir. June 24, 2003). The Eleventh Circuit, therefore, held that the EPA must prove the existence of a CAA violation in district court, and until that time the EPA's decision was "legally inconsequential." Accordingly, given the potentially self-serving nature of these decisions, they do not evidence a long-standing interpretation.

whether a project is routine in the industry, considering all relevant facts--e.g., nature and extent, scope, frequency, and cost." (Duke Energy Am. Br. Opp'n Mot. Partial Summ. J. at 29.)

A. Legislative intent

The EPA has promulgated under its regulations an RMRR exemption since the enactment of the NSPS. 40 C.F.R. § 60.2(h)(1)(1971) (Duke Energy Ex. 4) ("Routine maintenance, repair, and replacement shall not be considered physical changes."). This exemption was designed to achieve the congressional intent of not subjecting existing sources to the costly requirements of installing advanced pollution control devices.[9] Such a provision was necessary because of the expansive meaning afforded "physical change" under the definition of modification. In 1975, the EPA clarified that the RMRR provision under NSPS excluded from the definition of modification "maintenance, repair, and replacement ... routine for a source category." 40 C.F.R. § 60.14(e)(l)(1975) (Duke Energy Ex. 6); 40 Fed. Reg. 58,416, 58,419 (Dec. 16, 1975) (Duke Energy Ex. 7).

Under this regulatory framework, Congress enacted the PSD program in 1977. A generating facility is subject to the

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[9] *See* S. Rep. No. 91-1196, Comm. on Public Works, 91st Cong. 2d Sess. (1970), reprinted in Legal Compilation: Statutes and Legislative History, Environmental Protection Agency (Jan. 1975), at 15-16 (Duke Energy Ex. 3) ("The overriding purpose of [NSPS is] to prevent new air pollution problems, and towards that end, maximum feasible control of new sources at the time of their construction is seen by the committee as the most effective and, in the long run, the least expensive approach.").

strictures of the PSD program if it undergoes "construction," which Congress defined by explicitly incorporating the definition of "modification" under NSPS. 42 U.S.C. § 7479(2)(C)(1995). In accordance with this statutory mandate, the EPA defined the term "modification" as "any physical [or operational] change ... that would result in a significant net emissions increase of any pollutant subject to regulation under the Act." 40 C.F.R. § 51.166(b)(2)(i)(1987) (Duke Energy Ex. 21). Also consistent with the NSPS definition of modification, the EPA promulgated a provision excluding from the definition of "modification" projects undertaken at a facility that are "routine maintenance, repair, and replacement." *Id.* § 51.166(b)(2)(iii) (a). In order to give the PSD RMRR exemption its proper scope, this provision must be defined according to what is routine maintenance, repair, and replacement within the relevant source category.[10] This construction is compelled by the statutory mandate of the PSD program and congressional intent.

When Congress enacted the NSR program, it specifically stated its intent to incorporate the NSPS "usage"

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[10] The court in *United States v. Southern Ind. Gas & Elec. Co.*, 245 F. Supp. 2d 994, 1007-10 (S.D. Ind. 2003) ("*SIGECO*"), granted summary judgment for the EPA as to *SIGECO's* fair notice defense. As to the correctness of this determination, this court expresses no opinion. The *SIGECO* court also concluded that the EPA's position that RMRR should be defined relative to an individual unit was reasonable and therefore entitled to deference. The court in *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 2003 U.S. Dist. LEXIS 13799, 2003 WL 21910738, at *24-26 (Aug. 7, 2003 S.D. Ohio), arrived at a similar conclusion. As to that determination, this court, for the reasons contained herein, respectfully disagrees.

of the term "modification" into PSD, including the 1975 NSPS exclusion for maintenance, repair, and replacement projects that are routine for a source category. 42 U.S.C. § 7479(2)(C)(1995) ("The term 'construction' ... includes the modification (as defined in [NSPS]) of any source or facility."); 123 Cong. Rec. H11956, 3665 (daily ed. Nov. 1, 1977) (Duke Energy Ex. 13) (explaining Congress's intent "to conform" NSR definition of modification to the "usage" in NSPS). The EPA confirmed this congressional design. (Duke Energy Ex. 16 at 2) ("EPA has interpreted ... that for PSD purposes Congress intended the term modification to include all exemptions included in the NSPS regulations promulgated ... prior to the date of [PSD's] enactment ....").[11] Therefore, to be consistent with the NSPS "usage" of RMRR, the RMRR provision under PSD must be applied to cover those projects

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[11] Walter C. Barber, the former Director of EPA's Office of Air Quality Planning and Standards ("OAQPS"), explained:

> OAQPS carried over into the PSD and NNSR regulations the general mindset regarding the magnitude and scale needed to trigger a modification developed under the NSPS program and the specific NSPS definitional terms of "modification," "routine maintenance repair and replacement," and "increased hours of operation" and our interpretations thereof. Furthermore, as used in the PSD and NNSR programs, OAQPS gave these terms the same meaning and intent as in the NSPS program and believed that the same order of magnitude and scale needed to trigger NSPS would apply to the PSD and NNSR programs.

Barber Expert Report at 8 (Duke Energy Ex. 10).

that are routine for a source category. *See INS v. Cardoza-Fonseca,* 480 U.S. 421, 448 (1987) ("'If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.'" (quoting *Chevron U.S.A.,* 467 U.S. at 843 n.9)). The EPA acknowledged this standard for the PSD's RMRR exemption in 1992 by:

> clarifying that the determination of whether the repair or replacement of a particular item of equipment is "routine" under the NSR regulations, while made on a case-by-case basis, must be based on the evaluation of whether that type of equipment has been repaired or replaced by sources within the relevant industrial category.

57 Fed. Reg. 32,314, 32,326 (July 21, 1992).[12] The EPA specifically referred to "electric utilities" as a "source category." *Id.* at 32,317.

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[12] This "clarification" was not a pronouncement of a new rule. Indeed, the EPA stated that commentators had requested that the EPA "define or provide guidance on 'routine repair, replacement and maintenance' activities," but the rules the EPA was promulgating "did not deal with this aspect of the regulations." 57 Fed. Reg. at 32,326. The EPA recognized, however, that the RMRR exemption could potentially affect the rules it was issuing, and therefore stated its "plans to issue guidance on this subject as part of a NSR regulatory update package which EPA presently intends to propose by early summer." *Id.* The EPA went on to state that "in the meantime" it would clarify the appropriate standard for determining RMRR. *Id.* The EPA, nonetheless, now argues that what is routine within the "relevant industrial category"

B. WEPCO applicability determination

Prior to this affirmation of the routine in the industrial category standard for RMRR, the EPA issued an NSPS and PSD applicability determination for a proposed project at Wisconsin Electric Power Company's ("WEPCO") Port Washington facility. The EPA explained that "in determining whether proposed work at an existing facility is 'routine,' EPA makes a case-by-case determination by weighing the nature, extent, purpose, frequency, and cost of the work, as well as other relevant factors, to arrive at a common-sense finding." (Mem. from Clay to Kee (Sept. 9, 1988) at 3 (EPA Ex. 73).) The EPA intended this determination, which was set forth in a memorandum prepared by Don R. Clay, Acting Assistant Administrator for Air and Radiation, to be used not only by WEPCO, but also by other utilities which might seek to claim the RMRR exemption. (*Id.* at 2.)

WEPCO proposed a project at its five-unit Port Washington Power Plant that contemplated replacing rear steam drums, each of which measured 60 feet in length, 50.5 inches in diameter, and 5.25 inches in thickness; plate-type air heaters; and other components. (*Id.* at 4.) The five units at the Port Washington plant were originally rated at "80 megawatts electrical output capacity," but due to the deterioration of the physical plant, the units had operated at a maximum achievable capacity less than their original design capacity. (*Id.* at 2; Mem. from Kee to Emison (Mar. 25, 1988) (Duke Energy Ex. 31) (that units had been derated from their design

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is inapplicable to PSD. It would be a nonsensical interpretation of the EPA's 1992 clarification of the PSD RMRR exemption standard to assume that the EPA was clarifying a standard that did not exist under the exemption in the first instance.

capacity of 80 MW each to operating capacities ranging from 49 MW to 75 MW).) The EPA indicated that following the proposed project "plantwide capacity would increase about 40 percent above current levels to 400 megawatts." (Duke Energy Ex. 31 at 2.) Given this information, the EPA determined that the "work proposed at Port Washington [was] far from being a regular, customary, or standard undertaking." (EPA Ex. 73 at 3.) "Rather, [it was] a highly unusual, if not unprecedented, and costly project." (*Id.* at 4.).

In subsequent correspondence with WEPCO, the EPA further indicated that based on an informal survey, it had detected "no examples of steam drum replacement at aged electric generating facilities." (Letter from Thomas to Boston (Oct. 14, 1988) at 4 (Duke Energy Ex. 29).) Similarly, in response to WEPCO's contention that forty other units had replaced similar air heater elements, the EPA concluded that "no units containing plate elements such as those on units 1-4 at Port Washington" had ever replaced air heaters. (Letter from Clay to Boston (Feb. 15, 1989) at 7 (Duke Energy Ex. 30).) Accordingly, the EPA concluded that WEPCO's proposed project was not RMRR and the projects were therefore subject to NSPS and PSD.

WEPCO appealed the EPA's determination to the Seventh Circuit Court of Appeals. The court affirmed the EPA's determination that the project proposed at the Port Washington plant was not RMRR. *WEPCO*, 893 F.2d at 910-13. The court agreed with the EPA that "far from being routine, the Port Washington project apparently was unprecedented: 'WEPCO did not identify, and EPA did not find, even a single instance of renovation work at any electric utility generating station that approached the Port Washington life extension project in nature, scope or extent.'" *Id.* at 911 (quoting EPA Br. at 44). Although the record was silent, the court "surmised" that the unprecedented character of the Port Washington project "may reflect historical practice in the

electric utility industry" to replace facilities once they have reached their useful life. *Id.*

Among its arguments before the Seventh Circuit, WEPCO argued, as it had before the EPA, that its proposed replacement of air heaters paralleled similar replacements of air heaters at forty other plants. *Id.* In affirming the EPA's determination that the forty other air heater replacements were dissimilar, the court noted that "the plate-type air heaters at issue in the Port Washington project must be replaced in whole" while the air heaters at the forty other units, which contained tubular type heaters, "permitt[ed] the replacement of the heat transfer surface without requiring the removal of the entire unit." *Id.*

The EPA and the Seventh Circuit both confirmed the relevance of industry practice under the RMRR analysis. The EPA gave considerable attention to WEPCO's contention that the types of replacements it contemplated undertaking were "routine" because others in the industry had undertaken similar projects. While in the end the EPA disagreed, its disagreement was with WEPCO's characterization of the projects undertaken elsewhere, not with WEPCO's position that what other utilities were doing should inform the EPA's analysis. For example, in the Clay Memorandum, the EPA stated that the "work called for under the project was rarely, if ever, performed." (EPA Ex. 73 at 5.) This conclusion was confirmed by WEPCO which stated: "Generally, the renovation work items included in this application are those that would normally occur only once or twice during a unit's expected life cycle." (*Id.*) If the relevant inquiry under the RMRR exemption is whether a particular activity is "routinely performed at an individual unit" as the EPA now asserts, the EPA in *WEPCO* could have simply concluded its RMRR inquiry with the admission by WEPCO that the proposed project would occur only once or twice during a unit's expected life cycle

The EPA, however, requested that WEPCO "submit information regarding the frequency of replacement of steam drums, the largest category of work item called for under the project." (Id.) In response to this request, "WEPCO reported that to date, no steam drums have ever been replaced at any of its coal-fired electrical generating facilities." (*Id.*) WEPCO was able to provide examples of other "headers" comparable in design pressure and function, but the EPA distinguished these headers on the ground that they were not comparable in size. (Id. at 5-6 (stating that "the largest of these [headers] was 16 inches in diameter, and EPA does not believe that they are comparable in diameter, wall thickness, function, or importance to the rear steam drums at Port Washington"). The characteristic used to differentiate these "header" replacements from the rear steam drum header replacements proposed by WEPCO was not the extent to which the other headers had or had not been replaced, but rather was the size of the header and presumably the extent and cost of the work required to replace them.

In addition, WEPCO argued to the EPA that its rear steam drum replacements were routine, principally relying on its identification of four other steam drum replacement projects at other facilities. The EPA rejected WEPCO's reliance on these steam drum projects, finding that they were not "sufficiently similar to the Port Washington project." (Duke Energy Ex. 29 at 3.) The EPA distinguished several of the projects from WEPCO's project primarily on the ground that they did not involve utility boilers, i.e., they were not in the same source category. (*Id.* at 4.) Moreover, the EPA indicated that the results of its informal survey revealed "no examples of steam drum replacement at aged electric generating facilities." (*Id.*) The fact that no other utilities replaced steam drums can be relevant only if the appropriate inquiry is what is routine within the industry. Otherwise, there would be no need for the EPA to conduct an informal survey

given that steam drums are replaced only once or twice in the life of a generating unit.

The EPA attempts to bolster its current position that the EPA did not apply a routine in the industry standard in *WEPCO* by citing the EPA's conclusion as to the forty units that WEPCO alleged engaged in similar air heater replacement projects. The EPA concluded that the projects performed at the forty units identified by WEPCO involved a different type of air heater and were therefore "too dissimilar to the plate-type elements in use at units 1-4 to support WEPCO's contention that the work in question is routine." (Duke Energy Ex. 30 at 7.) This conclusion was affirmed by the Seventh Circuit. *WEPCO*, 893 F.2d at 911. The EPA continued, however, and stated:

> Further, even the list of air heater replacement work submitted by WEPCO did not establish this as routine repair work. Those 40 units comprise only a small fraction of total operating utility units, and even at the 40 units, air heater repair or replacement appears to have been a one-time occurrence, not routine repair.

(Duke Energy Ex. 30 at 7 n.6.) Contrary to the EPA's position, this reference further supports the industry standard for RMRR. Even if the replacement projects at these forty units were similar to the WEPCO project, the EPA determined that a particular project performed at forty units, which "comprise only a small fraction of total operating utility units," is not representative enough of the industry to establish that the project was routine. Furthermore, the EPA concluded in the alternative that this type of project could not be considered routine for the industry because these forty units did not undertake this type of project with enough frequency. If the air heater replacements were frequently performed at an individual unit and therefore "routine repair,"

by implication air heater replacements would be "routine repair" for the industry.

The EPA's continual reference to other projects within the utility industry confirms Congress's intent to define RMRR under PSD according to the relevant source category. The EPA, however, continues to argue that the reference in the WEPCO applicability determination to the fact that the proposed replacements would be performed only once or twice during the life of a unit reveals the appropriate standard for RMRR to be routine at an individual unit and that its interpretation is entitled to deference. To accept this proposition would require that one completely ignore all references in the WEPCO determination to what was done in the industry. Moreover, "'an agency's interpretation of a statute or regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view.'" *Miller v. AT & T Corp.*, 250 F.3d 820, 832 (4th Cir. 2001) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515, 129 L. Ed. 2d 405, 114 S. Ct. 2381 (1994)).

The EPA further asserts that its position is supported by the Seventh Circuit's decision, arguing that the court was "particularly persuaded" by the fact that the proposed activity occurred so infrequently at the particular units. (EPA's Mem. Supp. Mot. Partial Summ. J. at 22.) Duke Energy rightly points out, however, that the "opinion itself ... ascribes no overriding importance to that fact." (Duke Energy's Am. Br. Opp'n Mot. Partial Summ. J. at 17.) Indeed, the next sentence of the opinion provides: "WEPCO reported that it had never previously replaced a steam drum or 'header' of comparable size at any of its coal-fired electrical generating facilities." *WEPCO*, 893 F.2d at 912. The court's recognition of both the frequency of a project at an individual unit and in the industry confirms the relevant scope of the RMRR inquiry to be what is routine within the industry.

The only way in which both experience at a unit and in the industry at large can be relevant is under a routine within the industry standard. Projects that are repeatedly performed at a particular unit will be routine in the industry, as will projects performed at a number of units within the industry. If the relevant inquiry were that proposed by the EPA, namely that RMRR applies only to "activity routinely performed at an individual unit," consideration of what occurred within the utility industry is irrelevant. The EPA in *WEPCO* could have simply dismissed WEPCO's attempt to support the routineness of its proposed project by reference to other projects, as it does with Duke Energy here, and relied primarily on WEPCO's admission that the proposed project would be performed only once or twice in the life of a unit. Accordingly, applying its multi-factored test, the EPA could have determined that the project did not qualify as RMRR. Yet even if the EPA were to consider what occurred within the industry, the relevant inquiry under a "routine for an individual unit" standard would be the number of times a particular project is undertaken at a unit. The focus of the EPA's effort at distinguishing the projects identified by WEPCO from the Port Washington project, however, was on the type of equipment replaced, not the frequency with which it was replaced.

The EPA's "routine for an individual unit" interpretation of the *WEPCO* determination is certainly consistent with its analysis of the Buck 4 project. Nowhere in its discussion of the relevant factors as applied to this unit does the EPA consider what other utilities have done or are doing. This aspect of the *WEPCO* analysis has completely disappeared. What has occurred within the industry, however, is relevant and must inform the routine inquiry. This is revealed by the EPA's careful consideration of the other projects identified by *WEPCO*. This is also revealed by Congress's intent to define the application of the PSD

program according to the definitions and exemptions provided under the NSPS program. The EPA confirmed this intent in 1992 and must now apply the law as intended by Congress and as previously applied.

C. EPA's post-WEPCO statements

The "routine in the industry" standard is also supported by the EPA's statements that the *WEPCO* determination would not affect utility life extension projects.[13] In December

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[13] The EPA was aware of the utility industry practice of engaging in life extension projects as early as the 1980s. For example, EPA inspection reports from the 1980s indicate that projects were being performed that involved "major work aimed at upgrading and extending the operating life of [the] boilers" at an "estimated ... cost of $ 50 million." (Inspection Report of Riverside Generating Station (Oct. 18, 1985) (Duke Energy Ex. 78).) Another report stated that a unit was out for a "13 week life extension major overhaul, estimated to cost approximately $ 15 million." (Inspection Report of Beckjord Generating Station (Mar. 14, 1988) (Duke Energy Ex. 78).) Furthermore, a 1989 EPA-directed study designed to assess future utility air emission trends assumed that existing coal-fired power plants would continue to operate at original capacity for fifty-five to sixty-five years, being "refurbished" around age thirty. (1989 EPA Base Case Forecasts, App. C (Duke Energy Ex. 40); Letter from Schweers to Beck (July 26, 1989) (Duke Energy Ex. 41).) In March 1986, three EPA policy analysts published an article in which they listed ten "life extension" projects of which they were aware, including Duke Energy's PMP projects at the Dan River and Allen Plants. (James DeMocker, Judith Greenwald, Paul Schwengels, Extended Lifetimes for Coal-Fired Power Plants: Effect Upon Air Quality, Pub. Util. Fortnightly 30, Mar. 20, 1986, at 32-33 (Duke Energy Ex. 79).) That same year, an

1988, the Chairman of the House Subcommittee on Oversight and Investigations, Congressman John Dingell, informed the EPA Administrator, Lee Thomas, that his subcommittee had requested the Government Accounting Office ("GAO") to prepare a report on utility life extension issues. (Letter from Dingell to Thomas (Dec. 21, 1988) (Duke Energy Ex. 88).) The GAO issued its report in September 1990, stating that "according to EPA policy officials, WEPCO's life extension project is not typical of the majority of utilities' life extension projects and concerns that the agency will broadly apply the ruling it applied to WEPCO's project are unfounded." (GAO 1990 Report at 30-31 (Duke Energy Ex. 42).) "Lending evidence to the officials' statements," the report noted, "EPA's 1989 emission forecast assumed that the *WEPCO* decision would not result in a significant number of additional power plants having to comply with the NSPS and the PSD program requirements."[14] (*Id.* at 31.)

EPA official attended an Electric Power Research Institute ("EPRI") conference on "Life Extension and Assessment of Fossil Plants." (U.S. Resp. to Def.'s Req. for Admis. No. 223 (Excerpt at Duke Energy Ex. 81).) EPRI published the proceedings of the conference in an 1,100-page publication in which utilities, including Duke Energy, presented detailed descriptions of many "life extension" projects. (Conference Proceedings: Life Extension and Assessment of Fossil Power Plants, EPRI Pub. CS-5208 (1987) (Excerpt at Duke Energy Ex. 82).)

[14] Before the report was issued, GAO sent a fact sheet about life extension listing most of the information to be included in the report and asked for the EPA's comments. (*See* Mem. from Tiber to Kete et al. (Apr. 10, 1990) (Duke Energy Ex. 93).) The fact sheet was widely distributed among the personnel in the Office of Policy, Planning and Evaluation. (*See id.*)

Chairman Dingell formally transmitted the report to the EPA and asked the Administrator about *WEPCO* and the GAO report's assessment. (Letter from Dingell to Watkins et al. (Oct. 9, 1990) (Duke Energy Ex. 94).) Assistant Administrator William Rosenberg responded for the EPA, stating that "as indicated in the GAO report, it is expected that most utility projects will not be similar to the *WEPCO* situation" and that the "[*WEPCO*] ruling is not expected to significantly affect power plant life extension projects." (Letter from Rosenberg to Dingell (June 19, 1991) at 5-6 (Duke Energy Ex. 44).)

The EPA's position that life extension projects would not be significantly affected was again acknowledged in 1995. The EPA's Assistant Administrator for Air and Radiation stated in response to an industry proposal to add a "restoration" exemption to the NSR programs that the EPA's position was that the "routine maintenance exclusion already included in the existing NSR regulations ... has the effect of excluding 'routine restorations'" from the requirements of the NSR programs. ("EPA's Response to Issues Raised by Industry on Clean Air Act Implementation Reform," attached to Letter from Nichols to Lewis (May 31, 1995) at 19 (Duke Energy Ex. 46).)

The EPA's position on WEPCO's life extension project and life extension projects in general confirms the understanding that projects which are routine in the industry qualify as RMRR. To reconcile the EPA's previously stated position with its litigation position that RMRR applies only to routine activities performed at an individual unit, one must assume that a generating unit routinely and repetitively undergoes life extension projects. This assumption defies common sense. Further, this is an assumption the EPA

explicitly rejected when it assumed for the purpose of assessing future utility air emission trends that coal-fired generating utilities would undergo life extension refurbishment once around age thirty. (Duke Energy Ex. 40 at App. C.) Through the EPA's statements in the Federal Register, its statements to the regulated community and Congress, and its conduct for at least two decades the EPA has established an interpretation of RMRR under which routine is judged by reference to whether a particular activity is routine in the industry. *See Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 629 (5th Cir. 2001) ("existing practice" evidence of current interpretation of regulation). Accordingly, "'once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.'" *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999) (quoting *Paralyzed Veterans of Am. v. D.C. Arena*, 117 F.3d 579, 586 (D.C. Cir. 1997)).

D. Application of the WEPCO multi-factor test

The EPA in the *WEPCO* applicability determination identified a multi-factored test that must be used to evaluate whether a proposed project qualifies as RMRR. The EPA characterizes Duke Energy's RMRR test as providing that "if a project has ever been done before, it is 'routine maintenance'" and that "if a project has ever been performed by another utility, it is exempt." (EPA Reply Br. Supp. Mot. Partial Summ. J. at 4.) The *WEPCO* multi-factored test under this characterization of the approach advocated by Duke Energy would collapse the *WEPCO* test into a single inquiry--has this type of project been performed before. Because the *WEPCO* multi-factored test applies and is entitled to deference, the determination of RMRR cannot turn exclusively on whether a particular replacement project has

ever occurred in the industry. If this were dispositive, it would render the PSD program a nullity.

The frequency with which a component is repaired or replaced within the industry, however, cannot be ignored. Nor can the frequency with which a component is repaired or replaced at a particular unit be conclusive. Rather, the *WEPCO* factors--nature and extent, purpose, frequency, and cost--must be analyzed and applied in reference to the source or industry category. For example, if a proposed project were estimated to cost $50 million dollars, that figure must be analyzed against what other projects within the industry have cost. If projects within the industry routinely cost $20 million, the $50 million cost of the proposed project may be one consideration in support of a finding that the project is not RMRR. This inquiry must be performed for each *WEPCO* factor.

The EPA has moved for partial summary judgment on the Buck 4 project on the basis that the work performed was not RMRR for that particular unit. At this stage in the litigation, the court cannot conclude that there is no genuine issue of material fact as to whether the project at Buck 4 was non-RMRR. Insufficient evidence has been provided regarding whether the project undertaken at Buck 4, given the specific nature and extent, purpose, frequency, and cost of the work, is routine in the electrical utility industry. The EPA applied the WEPCO factors to Buck 4 in arriving at its determination that the Buck 4 project does not qualify as RMRR. That analysis, however, was focused only on Buck 4. Consequently, a further analysis of the *WEPCO* factors must be performed in order to characterize the project at Buck 4. Once a case-specific analysis has been performed, it must be determined whether a project of that character is routine or not routine in the industry.

Duke Energy moves for summary judgment as to all its units, contending that the projects at these units were RMRR. Duke Energy, however, has not presented sufficient evidence to persuade the court that no reasonable trier of fact could conclude otherwise. Duke Energy has presented the reports of its experts who conclude that Duke Energy's projects involved RMRR. (Tuppeny Expert Report (Duke Energy Ex. 62); Bishop Expert Report (Duke Energy Ex. 64).) These reports provide no specific information, however, as to the number of units within the industry that have engaged in similar work, whether the costs of Duke Energy's projects were comparable to the costs of other similar industry projects, etc. The EPA's expert did concede to Duke Energy that other utilities within the utility industry were performing work similar to that performed by Duke Energy. (Koppe Dep. at 63 (Duke Energy Ex. 61).) This alone is not sufficient to establish RMRR. If it were, the utility industry would be the ultimate authority on what is and is not permissible.

Because there are factual issues which remain for trial, it is appropriate that the court provide the parties with guidance as to who bears the burden of proving whether Duke Energy's projects qualify as RMRR. As a general proposition, the party claiming the benefit of a statutory or regulatory exception bears the burden of proof. *See United States v. First City Nat'l Bank of Houston*, 386 U.S. 361, 366 (1967); *United States v. Moore*, 613 F.2d 1029, 1044-45 (D.C. Cir. 1979). This general proposition is just that; it is not dispositive. Rather, it is merely an interpretive aid to be used by the court in evaluating and allocating burdens of proof. *See United States v. McArthur*, 108 F.3d 1350, 1354 (11th Cir. 1997) (characterizing rule as "merely [an] interpretative aid[]" to be considered along with "other indications of legislative will evident in the statute"). One court has expressed its view that the issue should be approached by drawing a distinction between an exception to a statutory prohibition and an

exclusion from a statutory definition. *EEOC v. Chicago Club*, 86 F.3d 1423, 1429-31 (7th Cir. 1996) (stating that there is an "important distinction between an exception to the prohibition of a statute and an exclusion from the definition of entities covered by [the] statute"). The court believes this approach to be useful as it allows for the consideration of legislative intent.

The requirements of PSD are triggered by any physical change that results in an increase in emissions. 40 C.F.R. § 51.166(b)(2)(i) (1987) (Duke Energy Ex. 21). The EPA has defined physical change expansively, such as the simple repair of a leaky pipe. *WEPCO*, 893 F.2d at 905; 57 Fed. Reg. 32,314, 32,316 (July 21, 1992) (stating that the EPA has "always recognized" that the definition of physical change could "encompass the most mundane activities at an industrial facility (even the repair or replacement of a leaky pipe)"). The EPA's burden of proving a "physical change," therefore, is quite easy to satisfy. The EPA has also recognized, however, "that Congress obviously did not intend to make every activity at a source subject to new source requirements" and therefore "defined 'modification' in the NSPS and NSR regulations to include common-sense exclusions from the 'physical ... change' component of the definition." 57 Fed. Reg. at 32,316. For example, both NSPS and PSD regulations "contain similar exclusions for routine maintenance, repair, and replacement."[15] *Id.* Accordingly, the

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[15] This exclusionary view is consistent with the EPA's historic understanding of the RMRR exemption. In the 1980 PSD regulations, the EPA stated, within a section entitled "Final Definitions of 'Major Modification' and 'Net Emissions Increase,'" that the statutory phrase "'physical change' ... [did] not encompass certain specific types of events," including "routine maintenance, repair and replacement." 45 Fed. Reg. 52,676, 52,698 (Aug. 7, 1980) (Duke Energy Ex. 22).

1980 PSD regulations provide that "[a] physical change ... shall not include ... routine maintenance, repair, and replacement." 40 C.F.R. § 51.166(b)(2)(iii) (a) (1987) (Duke Energy Ex. 21).

In light of the legislative intent not to include in the PSD requirements every activity and the EPA's exclusion of RMRR from the definition of physical change, the EPA should bear the burden of proving that Duke Energy's projects do not fall within this exemption. *See Chicago Club*, 86 F.3d at 1430-31 (explaining that where the "exclusion is incorporated in the definition" the defendant should not bear the burden of proving the exclusions application). To place the burden on Duke Energy would be in effect to sanction an almost de facto presumption of a PSD violation whenever a utility performs any type of work. This is especially true if the EPA applied the actual-to-potential emissions test, which always results in a net emissions increase, given the trivial showing necessary to prove a "physical change".[16] Congress, however, did not provide a presumption or anything approaching a presumption. The elements of a PSD violation, therefore, entail more than proving a physical change, which is no burden at all. It entails a showing that a utility engaged in a non-routine physical change that resulted in an increase in emissions. The EPA should appropriately bear the burden of making this showing at trial.

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[16] The EPA elected not to seek application of this test, although it did so not based on the validity of its position but for other considerations unknown to the court. *See infra* n.17.

IV. Net Emissions Increase

Like the exemption for RMRR, the parties have presented two competing methods for quantifying emissions increases, both of which presumably stem from the 1980 PSD regulations.[17] The EPA advances as the correct method the "actual-to-projected-actual" test. Under this test, a source must predict a project's impact on hourly emissions rates and hours and rates of production, i.e., capacity utilization. Duke Energy argues that the only method that can be applied to its projects is the "actual-to-actual" test. It contends that this is the test provided for under the 1980 regulations and that the test requires a comparison of pre-project actual emissions and future "actual" emissions, assuming constant hours and conditions of operation. The court finds, based on the PSD rules, the contemporaneous interpretations of the PSD rules, and the statutory language incorporating the NSPS concept of modification into PSD, post-project emissions must be calculated on an annual basis, measuring emissions in tons per year, and in calculating post-project emissions levels the

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[17] The EPA in its briefing argued that a third test, the "actual-to-potential" test should apply to Duke Energy's units. (EPA Mem. Supp. Mot. Partial Summ J. at 33-35.) Under the actual-to-potential test, the EPA assumes that a unit will operate at its maximum hourly rate of emissions and will do so continuously. Because no unit operates under these conditions, an emissions increase will always result. During the summary judgment hearing on July 18, 2003, the EPA indicated that it would not seek application of the actual-to-potential test but would rather pursue its contention that the emissions test under PSD requires consideration of both increased hourly rates and utilization. Accordingly, the court will not address the potential application of the actual-to-potential test.

hours and conditions of operation must be held constant. Accordingly, a net emissions increase can result only from an increase in the hourly rate of emissions.

A. Plain language of increased hours exclusion

The permitting and pollution control requirements of PSD are triggered by a non-routine physical change at a source that results in a "significant net emissions increase." 40 C.F.R. § 51.166(b)(2)(i)(1987) (Duke Energy Ex. 21). In order to prove a "net emissions increase," the EPA must show an "increase in actual emissions from a particular physical change or change in the method of operation at a stationary source." *Id.* § 51.166(b)(3)(i)(a). For units that have begun normal operations, such as the units at issue in the case at bar, "actual emissions" is defined according to a pre-project (or baseline) period that is "representative of normal source operation." *Id.* § 51.166(b)(21)(ii).[18] Thus, a comparison between the pre-project levels of emissions and post-project levels of emissions is required to determine whether there has been a net emissions increase above the baseline levels.

The key to this comparison is how to calculate the post-project emissions levels. Because an increase in emissions must result from a "physical [or operational] change," which by definition excludes "an increase in the hours of operation or in the production rate," *id.* § 51.166(b)(2)(iii)(f), post-project emissions levels must be calculated assuming the same pre-project "representative" conditions of operation, i.e.,

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[18] "For any emissions unit which has not begun normal operations ... actual emissions shall equal the potential to emit of the unit ...." 40 C.F.R. § 51.166(b)(21)(iv) (1987) (Duke Energy Ex. 21). Neither party seeks to apply this standard to the units at issue.

hours and rates of production. Under the 1980 PSD regulations, therefore, only if the project increases the hourly rate of emissions will there be an annual emissions increase.

The EPA asserts that the increased hours exclusion applies only to exclude increased utilization where the increased utilization is not associated with a construction project. Thus, whenever there is an increase in utilization coupled with a physical change, any increase in hours of operation and production rates may be considered in the emissions calculus. Such a limitation on the application of this exclusion, however, is not provided for in the plain text of the regulations. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). The only limitation on the increased hours exemption provided for in the regulations is that any increase in hours or rates cannot otherwise be prohibited by a federally enforceable permit.[19] 40 C.F.R. § 51.166(b)(2)(iii)(f) (1987) (Duke Energy Ex. 21). Nevertheless, the EPA contends that its interpretation of this exemption is reasonable and therefore entitled to deference. The court, however, cannot simply defer to the EPA's interpretation when that interpretation imposes an additional condition on a regulatory exemption. *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000) ("To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation.").

B. EPA's historic interpretation of increased hours exclusion

The court cannot defer to the EPA's interpretation when it is clearly contrary to earlier interpretations.

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[19] It is undisputed that Duke Energy's units are not subject to permit limitations on hours or rates of production.

Immediately after the promulgation of the PSD regulations in 1980, the EPA's Director of the Division of Stationary Source Enforcement ("DSSE"), Edward E. Reich, confirmed in two separate applicability determinations that the requirements of PSD would be implicated only by an increase in the hourly rate of emissions. In a June 24, 1981, applicability determination, Reich wrote that "PSD applicability [at a previously operating source] is determined by evaluating any change in the [hourly] emissions rates caused by" the physical or operational change being examined. (Letter from Reich to Gill (June 24, 1981) (Duke Energy Ex. 23).) Because the available data indicated that there would be no increase in the hourly rate of emissions following the contemplated change, Reich concluded that "actual emissions could increase only if there [was] an increase in the production rate or hours of operation, both of which are specifically exempt from PSD review." (*Id.*) This determination reconfirmed an earlier PSD applicability determination in which Reich stated that increased hours of operation, even when coupled with a physical or operational change, would not be considered a modification. (Mem. from Reich to Whitmore (Jan. 22, 1981) (Duke Energy Ex. 24).) Thus, absent an increase in the maximum hourly rate of emissions, the mandates of PSD are not implicated.

Once an agency issues a determination or ruling, it "'must either follow its own precedents or explain why it departs from them.'" *Puerto Rican Cement Co. v. United States EPA*, 889 F.2d 292, 298 (1st Cir. 1989) (quoting *Shaw's Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 36 (1st Cir. 1989)). The EPA attempts to explain why it has not followed its precedent by dismissing these determinations as "erroneous" and mere "dicta." Reich as the Director of the DSSE, however, was not a low-level employee from an irrelevant division opining as to what he believed the appropriate interpretation of the EPA regulations should be. Rather, he was the head of the division at the EPA responsible

for "providing guidance for interpretations which address the implementation of [the PSD] regulations." (Mem. from Reich to Devine (Feb. 13, 1978) (Duke Energy Ex. 143).) "[EPA] policy required that DSSE... make the final recommendation for interpretation of these requirements." (*Id.*) Accordingly, these contemporaneous interpretations provide compelling evidence of the rules' original meaning and cannot simply be ignored out of blind deference to the EPA's current interpretation. *Ohio Dep't of Human Servs. v. United States Dep't of HHS*, 862 F.2d 1228, 1234-35 (6th Cir. 1988).

C. Legislative intent

The interpretation that requires an increase in the hourly emissions rate and the exclusion of any increase in the hours of operation is not only consistent with the plain language of the regulations and the EPA's contemporaneous interpretations, but is also consistent with the NSPS definition of "modification" which was incorporated by explicit reference into PSD.[20] The PSD program provides that "no major emitting facility on which construction is commenced ... may be constructed in any area to which this part applies unless--(1) a permit has been issued." 42 U.S.C. § 7475(a)(l) (1995) (emphasis added). The term "construction" is defined to "include[] the modification (as defined in section 7411(a)

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[20] *See* 123 Cong. Rec. H11956, 3665 (daily ed. Nov. 1, 1977) (Duke Energy Ex. 13) (explaining that Congress intended "to conform" the NSR definition of "modification" to the "usage in other parts of the Act," namely NSPS). EPA interpreted this reference to "usage" to "mean that for PSD purposes Congress intended the term modification to include all exemptions included in the NSPS regulations promulgated ... prior to the date of [PSD's] enactment." (Duke Energy Ex. 16).

of this title [NSPS]) of any source or facility." *Id.* § 7479(2)(C). An NSPS modification requires a physical or operational change and an increase in the unit's maximum hourly rate of emissions. *Id.* § 7411(a)(4); 40 C.F.R. § 60.14(a) (1975) (Duke Energy Ex. 6). Thus, in order to undergo "construction" as defined in PSD, an existing source must also undergo a "modification" as defined in NSPS,[21] i.e., to undergo PSD construction a physical change must result in an increase in the hourly rate of emissions.

Under the emissions standard advanced by the EPA under the 1980 regulations, however, a physical change at an existing source that does not increase the source's hourly emissions rate, thereby implicating NSPS, could nonetheless trigger PSD based on a projected increase in hours of operation. Accordingly, an existing source would be considered modified under PSD even in the absence of an NSPS modification at that source. This interpretation of the regulations is inconsistent with the congressional design of defining PSD construction in terms of NSPS modification and should therefore be accorded little deference. *See Stinson v. United States*, 508 U.S. 36, 45 (1993) (stating that no weight

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[21] In 1975, the EPA revised the NSPS regulations to clarify that the modification definition applied to an increase "in emissions rate," "expressed as kg/hr." 40 Fed. Reg. 58,416, 58,419 (Dec. 16, 1975) (Duke Energy Ex. 7). The EPA explained that the unit of measurement would clarify that the modification rule would be sensitive to "increased production capacity and to the overall increase in total emissions to the atmosphere," i.e., to new capacity to emit pollution, while "automatically allowing increases in operating hours as intended by one of the existing exemptions under 40 CFR 60.2(h)." 39 Fed. Reg. 36,946, 36,947 (Oct. 15, 1974) (Duke Energy Ex. 8).

can be given to a regulatory interpretation that would "violate the Constitution or a federal statute").

The EPA contends that an emissions test for PSD that excludes from its calculations any emissions caused by an increase in the hours of operation ignores the critical differences between NSPS and PSD. Further, the EPA argues, this construction of the emissions test renders the PSD test indistinguishable from the NSPS test. While NSPS is focused on technology requirements for source categories, PSD requirements focus on the location of the source and its potential impact on air quality in that locality. *Northern Plains Res. Council v. United States EPA*, 645 F.2d 1349, 1356 (9th Cir. 1981). An hourly emissions rate test, however, contrary to the EPA's assertion, does not ignore the objectives of each program and does not render the test for each program indistinguishable.

PSD may be triggered if there is an increase in the maximum hourly emissions rate. In this regard, the PSD and NSPS emissions tests are similar. Unlike NSPS which is always triggered whenever there is an increase in the hourly rate of emissions, PSD is potentially triggered when there is an increase in the hourly emissions rate but only if the annualized emissions increase: (1) exceeds the significance levels in 40 C.F.R. § 51.166(b)(23) and (2) is not offset by contemporaneous decreases at the source, *id.* § 51.166(b)(3). These two conditions for PSD applicability--significance levels and netting--effectuate the air quality purpose of the PSD program. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 401 (D.C. Cir. 1979) (explaining that PSD is concerned only with air quality and thus requires netting). These conditions also explain why emissions under PSD must be calculated on an annual basis: measuring emissions in tons

per year makes possible netting (addition and subtraction) of emissions rates between various units at a plant.[22]

While courts have construed some of the same terms used in NSPS and PSD in different ways, these decisions do not compel a similar result here. In fact, the explicit reference by Congress incorporating the concept of NSPS modification into the PSD concept of construction compels the result that PSD is triggered only by an increase in a unit's hourly emissions rate.

In *Northern Plains*, the court upheld the EPA's interpretation of the term "commenced," which was defined

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[22] The netting provisions of PSD state:

> The first step in determining whether a "net emissions increase" would occur is to determine whether the physical or operational change in question would itself result in an increase in "actual emissions." If it would not, then it could not result in a "net emissions increase." If it would, the second step is to identify and quantify any other prior increases and decreases in "actual emissions" that would be contemporaneous with the particular change and otherwise creditable. The third step, finally, is to total the increase from the particular change with other contemporaneous increases and decreases. If the total would exceed zero, then a "net emissions increase" would result from the change.

45 Fed. Reg. 52,676, 52,698 (Aug. 7, 1980) (Duke Energy Ex. 22).)

differently under NSPS and PSD. 645 F.2d at 1354-57. The court examined the regulatory history, statutory provisions, and legislative history of the term and concluded that there was "no manifest congressional intent" to apply the same definition of "commenced" under both NSPS and PSD. *Id.* at 1355. Significantly, the court observed that "commenced" was not defined in the 1970 CAA Amendments but was instead defined in 1971 by an NSPS regulation. *Id.* Accordingly, the court rejected the argument that the term should be given the same meaning under both programs because when Congress enacted PSD in 1977, it explicitly defined "commenced" in the statute differently from the pre-existing NSPS definition and "expressly limited [the PSD definition] by the introductory phrase 'For purposes of this part--' to Part C of the Act, i.e., the statutory PSD program." *Id.*

The court in *Alabama Power* similarly relied on the statutory language in holding that the EPA had the authority to "adopt definitions of the component terms of 'source' that are different in scope from those that may be employed for NSPS ... due to differences in the purpose and structure of the [NSPS and PSD] programs." 636 F.2d at 397-98. The decision, however, was not based solely on the different objectives of the two programs. Rather, it was based in large measure on the differences in the statutory language used in NSPS and PSD to describe the term "source." *Compare* 42 U.S.C. § 7411(a)(3) (1995) (NSPS) (defining the term "source" to mean "any building, structure, facility, or installation") *with id.* § 7479(1) (PSD) (defining the term "source" to include "fossil-fuel fired steam electric plants ..., coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, ... [and] iron and steel mill plants"). This reference to "entire plants" in PSD, according to the court, demonstrated that "Congress clearly envisioned" that the term "source" should be given a different construction

under PSD than NSPS, which applies to individual units. *Alabama Power*, 636 F.2d at 397.

In stark contrast to these cases in which there was a clear congressional intent to treat similar terms differently, Congress clearly manifested its intent that the definition of "modification" should be given the same construction under NSPS and PSD. The CAA defines the term "modification" in only one place: 42 U.S.C. § 7411(a)(4) (NSPS). Seven years later, when Congress enacted PSD, it explicitly defined the application of PSD according to the NSPS definition of modification. Furthermore, Congress expressly stated that it intended "to conform" the PSD definition of "modification" to the "usage" of that term under NSPS. 123 Cong. Rec. H11956, 3665 (daily ed. Nov. 1, 1977) (Duke Energy Ex. 13). This court cannot envision a clearer indication of Congress's intent to trigger PSD only when NSPS is likewise triggered by an increase in the maximum hourly emissions rate.

D. *WEPCO* emissions test

The Seventh Circuit in *WEPCO*, the only appellate court[23] to date that has considered this issue, similarly concluded that for a source that has begun normal operations, PSD is potentially triggered only when there is an increase in the maximum hourly rate of emissions. *WEPCO*, 893 F.2d at 915-18. The EPA in *WEPCO* found that the replacements WEPCO proposed would increase "plantwide capacity ...

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[23] The court in *Ohio Edison* rejected the position that PSD is potentially triggered only by an increase in maximum hourly rates of emissions. 2003 U.S. Dist. LEXIS 13799, 2003 WL 21910738, at *44-47. Instead, the court accepted the EPA's position that emissions increases under PSD should be calculated considering both an increase in the hourly rate of emissions and an increase in utilization. *Id.* at *35-39. This court respectfully disagrees with this conclusion.

about 40 percent above current levels." (Duke Energy Ex. 31.) As such, the EPA reasoned that to increase the capacity of some WEPCO units in a way that increases their maximum achievable hourly emissions rates triggered NSPS. (EPA Ex. 73 at 11.) The *WEPCO* court affirmed this determination. *WEPCO*, 893 F.2d at 913-15.

In calculating the PSD emissions increases, the EPA sought to apply the "actual-to-potential" test to units that had undergone like-kind replacements. Under this approach, the EPA compared the actual annual emissions of the units during a pre-project representative period to the units' theoretical, total annual emissions, which presumes that the units operate at their maximum hourly emissions rate, twenty-four hours a day, 365 days a year. The EPA reasoned that because the source "'had not yet begun operations following the renovation, "actual emissions" following the renovation [were] deemed to be the source's "potential to emit."'" *WEPCO*, 893 F.2d at 916 (quoting Clay Mem. at 7).

The court rejected this approach and concluded that there was "no support in the regulations for the EPA's decision wholly to disregard past operating conditions at the plant." *Id.* at 917. On remand, the court ordered the EPA to determine "whether the renovated plant would cause a significant net emissions increase if it were operated under present hours and conditions." *Id.* at 918 n.14. This remand instruction explicitly sets forth the "actual-to-actual" test advocated by Duke Energy and previously applied by the EPA. (*See supra* § IV.B.) This test requires that the hours and conditions of operation be held constant and places the focus on an increase in the hourly emissions rate.

The EPA contends that the *WEPCO* remand instruction does not require application of the actual-to-actual test. Instead, it asserts that if the *WEPCO* court agreed with the formulation of the emissions test proposed by Duke

Energy, there would have been no need to remand the case, citing the court's acknowledgment that the EPA had "'assumed that emissions increases at Port Washington would come not from an increase in emission rate, but rather from increases in production rate or hours of operation.'" *WEPCO*, 893 F.2d at 916 (quoting Supplemental Determination at 9). Thus, the EPA argues, had the court agreed that the hours of operation must be held constant, it would have decided, based on the EPA's assumption about emissions rates, that PSD did not apply.

While the court arguably may have ignored an assumption by the EPA in providing its remand instruction, it did not ignore the specific facts of the case. It was undisputed that the WEPCO replacement projects resulted in the restoration and increase in the maximum capacity (i.e., hourly emissions rate) of the restored units. *Id.* at 910. Furthermore, the court upheld the EPA's determination that NSPS applied because of an increase in the units' maximum hourly rate of emissions. *Id.* at 913-15. However, even with the determination that the renovation caused an increase in the hourly rate of emissions a remand was necessary to determine whether that increase in emissions would exceed the PSD significance levels, and thereby trigger PSD.[24]

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[24] The PSD's applicability could not be determined by the court because "WEPCO never submitted pollutant-specific data to the EPA. Consequently, the EPA could not, at the time the matter was before it, conclude whether the renovated plant would cause a significant net emissions increase if it were operated under present hours and conditions." *WEPCO*, 893 F.2d at 918 n.14 (citation omitted). Accordingly, the court directed that "WEPCO should make such data available so that the EPA can determine on that basis whether the Port Washington plant will be subject to the PSD program." *Id.*

Following the remand, the EPA failed to calculate the PSD emissions levels as instructed by the Seventh Circuit. Instead it calculated post-project emissions levels by predicting future utilization of the plant. The EPA recognized that the remand instruction could be interpreted to require that hours of operation be held constant but dismissed this interpretation as "incorrect." (Letter from Rosenberg to Boston (June 8, 1990) at 6 (Duke Energy Ex. 33).) Similarly, an EPA attorney noted on an internal EPA memorandum about the *WEPCO* remand instruction that "'present hours' is absurd. EPA properly ignored it in [the] *WEPCO* remand." (Mem. from Rivkin to Wakefield (Feb. 26, 1991) at 14 (Duke Energy Ex. 140).)

Because the 1980 regulations do not provide for the actual-to-projected-actual test, the EPA relies on its interpretation of the *WEPCO* decision, in which the court stated that the EPA could not "wholly ... disregard past operating condition," *WEPCO*, 893 F.2d at 917, to support its actual-to-projected-actual test. Based on its interpretation of this language, the EPA asserts that its decision to include in the PSD emissions test any increase in utilization should be given deference. While deference to the EPA's interpretation of the CAA's Amendments and its technical regulations is typically substantial, *Lyng v. Payne*, 476 U.S. 926, 939 (1986); *Chevron U.S.A.*, 467 U.S. at 844, a similar deference in not warranted when what is being interpreted is the language of a judicial opinion. This is a task the court is equally able to perform.

The EPA does not rely on the language of the 1980 PSD regulations to support its method of calculating post-project emissions. Nowhere in the regulations is there a reference to an actual-to-projected-actual test or to increased utilization. In fact, the EPA admitted as much in its *WEPCO* applicability determination. WEPCO argued to the EPA that the EPA should "compare representative actual emissions

prior to the change with 'projected' actual emissions after the renovation." (EPA Ex. 73 at 7 n.4.) The EPA concluded that "the PSD regulations provide no support for this view." (Id.) More recently, the EPA's proffered expert on PSD regulations indicated that the tests he applied, which are variations of the actual-to-projected-actual test, were "not set forth in the 1980 rules" but were "plausible approaches." (Sahu Dep. at 156 (Duke Energy Ex. 66); Sahu Expert Report at 39, 41 (Duke Energy Ex. 110).) The EPA, however, cannot lawfully apply a standard not provided for in the regulations on the premise that it is a plausible approach. *See Panhandle Eastern Pipe Line Co. v. FERC*, 613 F.2d 1120, 1135(D.C. Cir. 1979) ("It has become axiomatic that an agency is bound by its own regulations. The fact that a regulation as written does not provide [the agency] a quick way to reach a desired result does not authorize it to ignore the regulation or label it 'inappropriate.'").

The fact that the 1980 PSD regulations do not provide the methodology the EPA seeks to apply is further highlighted by the EPA's decision to add through notice-and-comment procedures the very methodology it now contends the 1980 regulations provide. In 1992 the EPA promulgated the "*WEPCO* rule."[25] *See* 40 C.F.R. § 51.166(b)(21)(v),

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[25] The *WEPCO* Rule provisions providing an actual-to-projected-actual test do not apply to the projects at issue. The *WEPCO* Rule was not incorporated into the North Carolina SIP until December 4, 1995, and into the South Carolina SIP until July 8, 2002. See 60 Fed. Reg. 51,923 (Oct. 4, 1995) (EPA Ex. 127); 67 Fed. Reg. 30,594 (May 7, 2002) (EPA Ex. 128). The EPA enforces the SIP's rule until the SIP is revised. *General Motors Corp. v. United States*, 496 U.S. 530, 540 (1990). However, even for projects undertaken after the dates in which the *WEPCO* Rule was adopted, Duke Energy "'opted out' of the *WEPCO* calculus" by failing to satisfy the

(b)(32) (2002); 57 Fed. Reg. 32,314 (July 21, 1992). Under this rule, post-project actual emissions for the purpose of triggering PSD at utilities are equal to "representative actual annual emissions," which are generally defined as "the average rate, in tons per year, at which the source is projected to emit a pollutant for the two-year period after a physical change." 57 Fed. Reg. at 32,335. In calculating any increase in emissions, the regulations require consideration of the "effect any change will have on increasing or decreasing the hourly emissions rate and on projected capacity utilization." *Id.* The addition of the new *WEPCO* Rule appears to have been unnecessary if the 1980 regulations already provided this method.

In sum, the 1980 PSD regulations require that in calculating post-project emissions, the EPA must hold the pre-project and post-project hours and conditions of operation constant. This is the formulation dictated by the plain language of the 1980 regulations, the EPA's contemporaneous interpretations of those regulations, and the statutory and regulatory framework of the PSD program.

E. Application of the "actual-to-actual" emissions test

Duke Energy contends that because the EPA does not allege an increase in the hourly rate of emissions for any of its units following the projects, the EPA cannot establish a "net emissions increase" and it is therefore entitled to summary judgment on all claims. The EPA has alleged, however, that following the project at Buck 4 there was an increase in Buck 4's hourly rate of emissions above its baseline rate. This is

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regulatory prerequisite of submitting emissions data for a five-year period following the physical change. (EPA Mem. Supp. Partial Summ. J. at 35 n.14.)

principally due to the fact that Buck 4 was in ECS for approximately ten years. Accordingly, the EPA asserts that its baseline emissions rate is zero.

In calculating the baseline emissions rate, the regulations provide that "in general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation." 40 C.F.R. § 51.166(b)(21)(ii) (1987) (Duke Energy Ex. 21). Duke Energy argues that because Buck 4 was shutdown for economic reasons, the baseline period of normal source operation occurs during the period of actual operation preceding the shutdown. Therefore, because its post-project emissions rate did not increase above this pre-project level, PSD is not triggered.

Under the 1980 regulations, the EPA has historically presumed that the two years immediately preceding a change should be used to calculate the baseline. 45 Fed. Reg. 52,676, 52,705 (Aug. 7, 1980) (EPA Ex. 122). This interpretation has been applied on previous occasions. (*See, e.g., In re Monroe Elec. Generating Plant*, Petition No. 6-99-2 slip op. 14-16 (U.S. EPA 1999) (EPA Ex. 116) ("In calculating the net emissions increase for reactivation of long-dormant sources potentially subject to PSD, the source is considered to have zero emissions as its baseline."); Letter from Howekamp to Connery (Nov. 6, 1987) at 8 (Cyprus Casa Grande Applicability Determination) (EPA Ex. 159).)[26] For example, in the Cyprus Casa Grande PSD applicability determination,

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[26] *See also* 61 Fed. Reg. 38,250, 38,254 (July 23, 1996) (EPA Ex. 130) ("The EPA has historically used the 2 years immediately preceding the proposed change to establish the baseline. However, in some cases it has allowed use of an earlier period." (citation omitted)).

the EPA concluded that the emissions during the two-year period preceding the start-up of the plant were zero and that "this period [was] representative of normal operations, since the emissions [had] been zero during each of the last ten years while the plant [had] been shut down." (EPA Ex. 159 at 8.)

The regulations provide, however, that "the reviewing authority may allow the use of a different time period upon a determination that it is more representative of normal source operation." 40 C.F.R. § 51.166(b)(21)(ii) (1987) (Duke Energy Ex. 21). The EPA has indicated that the discretion to depart from the zero baseline presumption for long-dormant facilities is narrow and generally limited to extraordinary occurrences. Duke Energy argues that the agency interpretation of the regulations that controls the baseline level is the North Carolina Department of Environmental and Natural Resources' ("NCDENR") interpretation.

In 1982, the EPA approved North Carolina's PSD rules, thereby authorizing the State "to issue and enforce PSD permits for sources located in [North Carolina]." 47 Fed. Reg. 7836 (Feb. 23, 1982) (Duke Energy Ex. 26). Duke Energy argues, therefore, that the NCDENR's interpretation of North Carolina's PSD rules governs what period should be used to calculate pre-project baseline emissions levels. Accordingly, Duke Energy refers to the testimony of John Evans, the head of the NCDENR, in which he stated that, under North Carolina PSD regulations, NCDENR considers the last two years of operation preceding the shutdown as the representative baseline period for any physical change that might have occurred during the shutdown. (Evans Dep. at 11-12 (Duke Energy Ex. 146).)

The EPA asserted during oral argument that this evidence was irrelevant because Duke Energy never requested from the appropriate authority a different baseline. Thus, according to the EPA, Duke Energy cannot argue, ex

post, that it should be allowed a different representative period. Whether Duke Energy can request a different baseline after the project has been completed and an enforcement action has been initiated will not be decided by the court at this time. Assuming only for purposes of summary judgment that Duke Energy may make such an ex post request, there exists at a minimum a question of fact as to whether Duke Energy can make the necessary showing that a different baseline is more representative of normal source operations. If it is ultimately successful in making such a showing, the EPA must then prove, as it must for all projects, that the Buck 4 project caused the unit's hourly emissions rate to increase above its baseline rate. For this reason, the court cannot grant either parties' motion for summary judgment as to Buck 4. As to the other twenty-eight projects, given the size and complexity of the record, the court will defer ruling on whether these projects resulted in an increase in emissions above the baseline rate. To the extent the projects did not increase the unit's maximum hourly rate of emissions, however, these projects are not subject to PSD.

V. Statute of Limitations

The EPA, pursuant to 42 U.S.C. § 7413(b)(2), seeks civil penalties up to $25,000.00 per day of violation for violations occurring on or before January 30, 1997, and $27,500.00 per day of violation for violations occurring after January 30, 1997, and injunctive relief pursuant to 42 U.S.C. §§ 7413(b), 7477. Duke Energy, on August 20, 2001, moved for partial judgment on the pleadings. According to Duke Energy, its alleged failure to comply with the preconstruction permit requirements resulted in discrete violations that were complete at the time of actual construction. Thus, any claim for civil penalties resulting from alleged modifications that occurred more than five years prior to the filing of this lawsuit are barred by the applicable statute of limitations. The EPA and Intervenor-Plaintiffs, on the other hand, contend that

any civil penalties arising from these alleged modifications are not time barred because Duke Energy's failure to obtain a preconstruction permit and subsequent operation of the plants constitute a continuing violation. They accordingly move for summary judgment on this defense by Duke Energy. The EPA and Intervenor-Plaintiffs also seek a determination as to whether the applicable statute of limitations bars the imposition of injunctive relief.

A. Civil penalties

The CAA does not provide a specific statute of limitations applicable to alleged violations of its provisions. Accordingly, the general federal statute of limitations for civil enforcement actions applies. The general federal statute of limitations provides in part that "except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued." 28 U.S.C. § 2462 (1994). The EPA filed its complaint on December 22, 2000. Therefore, unless Duke Energy's alleged modifications and subsequent operation of its generating facilities constitute continuing violations, any civil penalties arising from alleged violations of the CAA before December 22, 1995, are barred by the five-year statute of limitations.

Duke Energy argues that a claim "first accrues" under 28 U.S.C. § 2462 on the date that a violation first occurs. *See 3M Co. v. Browner*, 17 F.3d 1453, 1462 (D.C. Cir. 1994) ("the term 'accrued' in § 2462 has been taken to mean that the running of the limitations period in penalty actions is measured from the date of the violation"). Duke Energy further contends that it is well settled that violations of preconstruction permitting requirements occur when actual construction is commenced at the facility, and not at some

later time.[27] *See, e.g., United States v. Westvaco Corp.*, 144 F. Supp. 2d 439, 443 (D. Md. 2001); *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054, 1083-84 (W.D. Wis. 2001); *United States v. Louisiana-Pacific Corp.*, 682 F. Supp. 1122, 1130 (D. Colo. 1987). Therefore, according to Duke Energy, any civil penalties arising from modifications commenced before December 22, 1995, are time barred.

The Supreme Court has held that statutes of limitations do not bar claims for continuing violations. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982) ("Statutes of limitations ... are intended to keep stale claims out of the courts. Where the challenged violation is a continuing one, the staleness concern disappears." (citation omitted)). In order to determine whether Duke Energy's alleged failure to obtain a preconstruction permit constitutes a continuing violation, the court must determine whether these alleged violations constitute a discrete, single violation (i.e., at the time of construction) or whether any aspect of "the detrimental effect to the public and the advantage to the [defendant] continue." *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 231 (1975).

The preconstruction requirements of PSD provide in part:

> No major emitting facility on which construction is commenced ... may be constructed in any area to which this part applies unless--(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part.

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[27] This position has emerged as the majority rule. This court, however, is not bound by the interpretation adopted by these courts.

42 U.S.C. § 7475(a)(l)(1995) (emphasis added). Courts which have held that the statute of limitations operates to bar claims more than five years old focus on the language regarding construction. *See, e.g., Westvaco*, 144 F. Supp. 2d at 444-45. They also rely on the fact that the PSD permitting process entails conducting extensive impact analysis prior to construction. *See, e.g., United States v. Southern Ind. Gas & Elec. Co.*, 2002 U.S. Dist. LEXIS 14039, 2002 WL 1760752, at *5 (S.D. Ind. July 26, 2002). These courts, however, focus on these aspects of the PSD permit process to the exclusion of the language in the statute stating that the PSD permit shall set forth emission limitations for that source following the construction activity. Yet this aspect of the PSD permitting process and compliance with these emission limitations is just as integral to achieving the objectives of PSD as the preconstruction analysis and review. Thus, facilities contemplating undergoing a modification must obtain a PSD permit prior to construction and, following construction, operate in accordance with the terms of that permit.

In an earlier decision, this court held that obtaining a preconstruction permit that sets forth emission limitations amounts to a condition of operation in the context of determining whether Intervenor-Plaintiffs were entitled to intervene as a matter of right under 42 U.S.C. § 7604(b)(1)(B). *United States v. Duke Energy Corp.*, 171 F. Supp. 2d 560 (M.D.N.C. 2001). Although this court is not limited by its earlier decision, there is no reason to depart from this holding in deciding whether claims for civil penalties for an alleged violation of PSD preconstruction permitting requirements are barred by the statute of limitations.

Determining the emission limitations involves the application of best available control technology ("BACT") for pollutants emitted by the particular facility. *See* 42 U.S.C. §

7475(a)(4) (1995). This determination is done on a case-by-case basis, taking into account "energy, environmental, and economic impacts and other costs." *Id.* § 7479(3). As such, the implementation of BACT is a condition of operation and the Administrator or State may bring an enforcement action seeking injunctive relief for the alleged failure to apply best available technology. *See id.* § 7477. Thus, the requirement of obtaining a preconstruction permit amounts to a condition of operation and establishes ongoing obligations.

The permitting process involves not only preconstruction review but also the determination of BACT, i.e., the setting of emission limitations, and absent the proper implementation of BACT a source operator may be enjoined from operating. This ability to enjoin an operator fulfills the intended purpose of PSD by preventing the emission of excess air pollutants which would otherwise be prohibited by a PSD permit. *See United States v. Ohio Edison Co.*, No. 2:99-CV-1181, at *12, 2003 U.S. Dist. LEXIS 2357 (S.D. Ohio Jan. 17, 2003) (EPA Ex. 112) (holding that penalties for failure to obtain a PSD permit were not time-barred because "the PSD provisions contemplate not only certain preconstruction obligations but also subsequent operation after modification"); *United States v. American Elec. Power Serv. Corp.*, 137 F. Supp. 2d 1060, 1066 (S.D. Ohio 2001) (stating that it is "illogical to conclude that a defendant may only be held liable for constructing a facility, rather than operating such facility, without complying with the [PSD] permit requirements").

The difficulty courts have encountered in determining whether the PSD permits contain both construction and operation obligations stem in large part from the inclusion of both types of permits under the CAA. The Fifth Circuit stated that "the CAA statutory scheme contemplates at least two different types of air permits unhappily named 'preconstruction permits' and 'operating permits,' with

confusion easily resulting from the fact that preconstruction permits often include limits upon a source's operations." *United States v. Marine Shale Processors*, 81 F.3d 1329, 1355-56 (5th Cir. 1996). But because the PSD permitting provisions provide both preconstruction obligations and subsequent obligations on operations, Duke Energy's alleged violation of failing to undergo the PSD permitting process does not terminate upon the completion of construction activity. The violation continues because each day that Duke Energy operates an allegedly modified plant and emits pollutants into the atmosphere, it may be in violation of the requirement to comply with the operation conditions, i.e., the emission limitations, that would have been contained within a PSD permit had Duke Energy submitted to the permitting process.

Duke Energy argues, however, and several courts have agreed, that any permits relating to conditions of operation fall under Title V of the Act, 42 U.S.C. §§ 7661a-7661f, and that the PSD provisions address only construction and modification requirements. Yet Duke Energy concedes that "PSD permits can contain conditions relating to operations of a source," but argues that this is not the "asserted basis of liability in this case. Rather, the issue in this case is whether Duke [Energy] was obligated to get permits before undertaking the projects at issue." (Duke Energy Br. Reply Supp. Mot. Partial Judge. on Pleadings Against Plaintiff-Intervenors at 6.) Duke Energy contends, therefore, that any PSD requirements that impose operating conditions are displaced by the existence of operating permits under Title V of the Act.

Despite Duke Energy's argument otherwise, the Title V operating permit program does not supplant the PSD program. Title V does not establish additional substantive requirements, but merely brings together applicable requirements, such as the PSD provisions, into one permitting

scheme. 57 Fed. Reg. 32,250, 32,251 (July 21, 1992). Title V explicitly states that compliance with a Title V permit is not "deemed compliance with other applicable provisions" of the Act unless a permit explicitly incorporates those other provisions or those provisions have been formally determined to be inapplicable. 42 U.S.C. § 7661c(f) (1995). Furthermore, Title V states that "nothing in this subsection shall be construed to alter the applicable requirements ... that a permit be obtained before construction or modification." *Id.* § 7661a(a). In fact, sources that have applied for (but not yet received) Title V permits are generally given temporary protection with the exception of sources that are not in compliance with applicable construction or modification permit requirements. *Id.* § 7661b(d).

Courts adopting the majority view have supported their position by relying on the fact that the SIP of a particular state may have a separate construction and operation permitting scheme. *See, e.g., United States v. Campbell Soup Co.*, 1997 U.S. Dist. LEXIS 3211, 1997 WL 258894, at *1-3 (E.D. Cal. Mar. 11, 1997). To the extent that this is relevant, and the court has reservations that it is, that rationale has no application to the case at bar. Both the SIP of North Carolina and South Carolina contain an integrated construction and operation permit. North Carolina's permit procedures provide that "a new, modified, or existing facility or source shall not begin construction or operation without first obtaining a construction and operation permit."[28] N.C. Admin. Code tit. 15A, r.2Q.0301 (emphasis added). The SIP of South Carolina

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[28] The requirement of a unitary or dual purpose permit for PSD applicability was confirmed in a letter from the North Carolina Chief of Air Quality to the EPA. It stated that "all Air Quality Permits issued in North Carolina by the Division of Environmental Management will be a combined 'construction and operation' permit." (Letter from Johnson to Miller (Apr. 16, 1986) (EPA Ex. 113).)

states that "any owner or operator who constructs or operates a source or modification not in accordance ... with the terms of any approval," which includes emission limitations, is subject to enforcement action. 61 S.C. Code Ann. Regs. 62.5, No. 7(r)(1) (emphasis added).

Holding that Duke Energy's alleged failure to obtain a preconstruction permit constitutes a continuing violation is consistent with the purpose of the CAA and the PSD provisions. The fundamental purpose of the CAA is to "speed up, expand, and intensify the war against air pollution in the United States." H.R. Rep. No. 91-1146, at 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5356, 5356. Yet Duke Energy's position that a violation of PSD is a discrete act that occurs only as long as the construction would not achieve these objectives. Rather, it would convert the PSD program, which is aimed at protecting air quality, into the "'Prevention of Significant Delay in construction'" program. (EPA Mem. Supp. Mot. Partial Summ. J. at 39.) Because penalties could be accessed only according to the duration of unpermitted construction, it could in certain circumstances be more cost-effective to avoid the permit obligations altogether and, if challenged, litigate the claim endlessly with little incentive to settle and no downside risk of an increasing fine. Accordingly, because the requirement of obtaining a preconstruction permit amounts to a condition of operation, Duke Energy's alleged failure to obtain a preconstruction permit under Section 7475 and applicable SIP provisions constitutes a continuing violation and the EPA's claims for civil penalties are therefore not barred.[29]

B. Injunctive relief

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[29] The EPA concedes that it "will not seek civil penalties from Duke [Energy] for days of violation prior to December 22, [1995]--five years prior to the filing of this enforcement action." (EPA Opp'n Mot. Partial Judg. on Pleadings at 2 n.1.)

In addition to seeking summary judgment on Duke Energy's defense that civil penalties for certain projects are barred by the statute of limitations, the EPA and Intervenor-Plaintiffs move for summary judgment on Duke Energy's defense that the statute of limitations bars injunctive relief on projects completed more than five years prior to the filing of this suit. By its plain terms, the general federal statute of limitations has no application to injunctive relief. It pertains only to actions for "any civil fine, penalty, or forfeiture, pecuniary or otherwise." 28 U.S.C. § 2462 (1994). The CAA, moreover, specifically provides for both a "civil penalty" and a separate "permanent or temporary injunction." 42 U.S.C. § § 7413(b), 7477 (1995). Courts have therefore held that Section 2462 does not bar injunctive relief as a matter of law. *See United States v. Telluride Co.*, 146 F.3d 1241, 1245 (10th Cir. 1998); *United States v. Banks*, 115 F.3d 916, 919 (11th Cir. 1997); *Westvaco*, 144 F. Supp. 2d at 443 n.2; *Murphy Oil*, 143 F. Supp. 2d at 1087. As previous courts have held and according to the plain language of Section 2462, the statute of limitations does not operate to bar the EPA and Intervenor-Plaintiffs' claims for injunctive relief.

CONCLUSION

For the reasons set forth in this opinion, the court will deny Duke Energy's motion for summary judgment, grant in part and deny in part the EPA's motion for partial summary judgment in which Intervenor-Plaintiffs join, deny Intervenor-Plaintiffs' motion for partial summary judgment on Duke Energy's defense of "fair notice," and deny Duke Energy's motion for partial judgment on the pleadings. Remaining for trial will be the issues of whether Duke Energy's projects were routine maintenance, repair, and replacement as defined relative to the industrial category and whether Duke Energy's projects caused an increase in annual net emissions, assuming constant hours and conditions of operation.

An order and judgment in accordance with this memorandum opinion shall be entered contemporaneously herewith.

Frank W Bullock, Jr.
United States District Judge

August 26, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,
Plaintiff and Counter-Defendant, and
ENVIRONMENTAL DEFENSE; NORTH CAROLINA SIERRA CLUB; and NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP CITIZEN LOBBY/EDUCATION FUND,
Intervenor- Plaintiffs,

v.

DUKE ENERGY CORPORATION,
Defendant and Counter-Claimant.

Civil No. 1:00CV01262

ORDER AND JUDGMENT

BULLOCK, District Judge:

For the reasons set forth in the memorandum opinion filed contemporaneously herewith,

IT IS ORDERED that Duke Energy's motion for summary judgment [Doc. # 128] is **DENIED.**

IT IS FURTHER ORDERED that the United States' motion for partial summary judgment [Doc. # 132] on the applicable legal tests for "routine maintenance" and calculation of emissions, and on Duke Energy's defenses of "fair notice" and "routine maintenance," in which Intervenor-Plaintiffs join [Doc. # 130], is **DENIED.**

IT IS FURTHER ORDERED AND ADJUDGED that

the United States' motion for partial summary judgment [Doc. # 132] on Duke Energy's defense that the statute of limitations bars the United States' claims arising from activities occurring prior to December 22, 1995, in which Intervenor-Plaintiffs join [Doc. # 130], is **GRANTED.**

IT IS FURTHER ORDERED that Intervenor-Plaintiffs' motion for partial summary judgment [Doc. # 130] on Duke Energy's defense of "fair notice" is **DENIED.**

IT IS FURTHER ORDERED that Duke Energy's motion for partial judgment on the pleadings [Doc. # 37] is **DENIED.**

Remaining for trial are the issues of whether Duke Energy's projects were routine maintenance, repair, and replacement as defined relative to the industrial category and whether Duke Energy's projects caused an increase in annual net emissions, assuming constant hours and conditions of operation.

Frank W Bullock, Jr.
United States District Judge

August 26, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,
Plaintiff and Counter-Defendant, and
ENVIRONMENTAL DEFENSE; NORTH CAROLINA SIERRA CLUB; and NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP CITIZEN LOBBY/EDUCATION FUND,
Intervenor- Plaintiffs,

v.

DUKE ENERGY CORPORATION,
Defendant and Counter-Claimant.

Civil No. 1:00CV01262

ORDER AND FINAL JUDGMENT

BULLOCK, District Judge:

On August 26, 2003, the Court issued a Memorandum Opinion in this action (Docket No. 234) addressing the parties' motions for summary judgment (hereinafter the "Summary Judgment Order"), in which the Court made certain legal determinations to be applied in this case, including the legal standard to be applied in determining whether Defendant Duke Energy Corporation's ("Duke Energy") projects were "routine maintenance, repair, and replacement" and hence not subject to regulation under the Prevention of Significant Deterioration ("PSD") provisions of the Clean Air Act and related regulations, as well as the legal standard for calculating whether Duke Energy's projects caused an increase in annual net emissions triggering PSD. In particular, with regard to the latter issue, the Court

determined as a matter of law that, for purposes of determining whether Duke Energy's projects resulted in a "net significant emissions increase" triggering PSD requirements, "post-project emissions must be calculated on an annual basis, measuring emissions in tons per year, and in calculating post-project emissions levels the hours and conditions of operations must be held constant. Accordingly, a net emissions increase can result only from an increase in the hourly rate of emissions." (Docket No. 234 at 48.) The Court deferred ruling on the issue of whether Duke Energy's projects resulted in an increase in emissions above the baseline rate until trial, but held as a matter of law that "to the extent the projects did not increase the unit's maximum hourly rate of emissions, however, these projects are not subject to PSD." (Docket No. 234 at 70.) The Court subsequently considered and denied Plaintiff United States' Motion for Reconsideration of the Summary Judgment Order. (Docket No. 294.)

Plaintiff United States and Plaintiff-Intervenors Environmental Defense, *et al.* and Duke Energy have submitted a joint stipulation that obviates the need for a trial under the legal standards applicable in this case under the Summary Judgment Order, and that enables the Court to enter an appealable final judgment under those legal standards, thereby saving the parties and the Court the time and expense of a trial. Specifically, the parties have made the following stipulations:

1. Plaintiff and Plaintiff-Intervenors stipulate that their contention that each of the projects at issue in this case resulted in a significant net emissions increase within the meaning of the relevant PSD regulations is based solely on their contention that the projects would have been projected to result in an increased utilization of the units at issue.

2. Plaintiff and Plaintiff-Intervenors stipulate that they

do not contend that the projects at issue in this case caused an increase in the maximum hourly rate of emissions at any of Duke Energy's units.

3. Plaintiff and Plaintiff-Intervenors stipulate to the dismissal, with prejudice, of those Claims for Relief which are not PSD claims (the "Non-PSD Claims"), *i.e.*, the even-numbered Claims for Relief in the Complaint, as incorporated by reference in the Complaint-in- Intervention.

4. Defendant stipulates to the dismissal of its counterclaims in this action, without prejudice to revive such counterclaims in the event of a remand of this case as the result of an appeal. In the event of a remand, Plaintiff and Plaintiff-Intervenors will not oppose Defendant's counterclaims on timeliness or statute of limitations grounds.

5. The Parties stipulate that the Court stay enforcement of Magistrate Judge Eliason's Orders regarding the UARG documents (Docket Nos. 164, 244 and 250) and stay consideration of Duke Energy's Rule 72(a) Objections (Docket No. 252) and UARG's Rule 72(a) Objections (Docket No. 251 and 281) to those orders. Upon entry of such a stay and a final judgment and order pursuant to the Joint Motion for Entry of Final Judgment, Plaintiff shall return the documents that are the subject of those Orders and Objections and any and all copies of these documents to Defendant. Defendant shall retain and preserve these documents.

6. Upon entry of an Order staying enforcement of Magistrate Judge Eliason's Orders regarding the UARG documents (Docket Nos. 164, 244 and 250) and staying consideration of Duke Energy's Rule 72(a) Objections (Docket No. 252) and UARG's Rule 72(a) Objections (Docket No. 251 and 281), Plaintiff and Plaintiff-Intervenors agree to the withdrawal of the documents submitted as Exhibits 166-176 in support of Plaintiff's Motion for Reconsideration

(Docket No. 268) and stipulate that these documents and the other documents that are the subject of Duke Energy's Rule 72(a) Objections (Docket No. 252) and UARG's Rule 72(a) Objections (Docket No. 251 and 281) shall not be part of the record in any appeal of the final judgment entered pursuant to the Joint Motion for Entry of Final Judgment. Plaintiff and Plaintiff-Intervenors further stipulate that they shall not refer to these documents and the other documents that are the subject of Duke Energy's Rule 72(a) Objections (Docket No. 252) and UARG's Rule 72(a) Objections (Docket No. 251 and 281) in any of their argument or filings in the course of that appeal.

7. In the event of a remand after appeal of a final judgment entered pursuant to the Joint Motion for Entry of Final Judgment, Plaintiff and Plaintiff-Intervenors reserve the right to seek to lift the stay of enforcement of Magistrate Judge Eliason's Orders regarding the UARG documents (Docket Nos. 164, 244, and 250), and Defendant and UARG reserve the right to seek to lift the stay of consideration of Duke Energy's Rule 72(a) Objections (Docket No. 252) and UARG's Rule 72(a) Objections (Docket No. 251 and 281).

8. With respect to the miscellaneous action pending in the United States District Court for the District of Columbia relating to subpoenas served upon UARG, Plaintiff agrees to withdraw the subpoenas served on UARG in United States v. Duke Energy Corp. (M.D.N.C.). If this case is remanded as the result of an appeal, UARG and Defendant will not oppose the enforcement of new subpoenas as untimely.

9. Defendant stipulates to the withdrawal of Duke Energy's Motion for Sanctions (Docket No. 286) with prejudice, and Duke Energy's Motion to Strike Exhibits 166-176 (Docket No. 282), without prejudice.

10. Plaintiff and Plaintiff-Intervenors reserve the right

to appeal the final judgment as to the PSD claims in this action. *i.e.*, the odd-numbered Claims for Relief in the Complaint, as incorporated by reference into the Complaint-in-Intervention. Defendant agrees and stipulates that the final judgment entered in connection with these stipulations is appealable by Plaintiff and Plaintiff-Intervenors as of right pursuant to 28 U.S.C. § 1291 with respect to the PSD claims in this action.

The Stipulations eliminate any need for a trial by this Court to determine any facts relevant to whether Duke Energy's projects triggered PSD. In this case, Plaintiff and Plaintiff-Intervenors (collectively "Plaintiffs") do not contend that any of the projects "increased the unit's maximum hourly rate of emissions." (Docket No. 234 at 70.) Accordingly, under the test set forth by the Court, "these projects are not subject to PSD" as a matter of law (*id.*), and Plaintiffs cannot prevail at trial. Establishing an emissions increase is an essential element of Plaintiffs' PSD claims, and the failure of this element is grounds for granting summary judgment. *McClain v. South Carolina Nat. Bank*, 105 F.3d 898, 901 (4th Cir. 1997), *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986) (if a party cannot prevail on an element of a claim that is essential to that claim, summary judgment on the entire claim is appropriate).

Plaintiffs' stipulation is not equivalent to a voluntary dismissal of the PSD Claims, because Plaintiffs clearly contend that a different legal test is applicable for determining PSD requirements. Specifically, Plaintiffs contend that PSD emissions increases can occur as the result of projects that would increase the projected capacity utilization (hours of operation) of a unit, even if hourly emissions rates are unchanged. The Court has rejected Plaintiffs' interpretation of the PSD emissions test. In light of Plaintiffs' stipulation, there is nothing currently left for trial, but Plaintiffs have appropriately reserved the right to appeal the resulting

dismissal of their PSD Claims.

The even-numbered claims in the Complaint, which are incorporated by reference into the Complaint-in-Intervention, allege that Duke Energy's projects violated the general permitting requirements under the North Carolina or South Carolina State Implementation Plans ("SIPs"). In order to enable the Court to enter an appealable final judgment on all claims in this case, however, Plaintiffs have stipulated to the voluntary dismissal, with prejudice, of these Non-PSD claims.

This leaves the issue of Defendant Duke Energy's counterclaims. Duke Energy's counterclaims are premised on the threatened application of the interpretation of the PSD regulations urged by EPA in this case. The Court has rejected EPA's interpretation of the PSD regulations. Accordingly, Duke Energy has stipulated to the dismissal of these claims, without prejudice to Duke Energy to revive them in the event that they become relevant in a remanded proceeding. Dismissal of these counterclaims as requested by Duke Energy eliminates them as a technical obstacle to finality.

All of the claims in this action have been addressed. This Order constitutes a final judgment entered pursuant to Rule 58(a) of the Federal Rules of Civil Procedure. An appealable final judgment is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 467, 57 L. Ed. 2d 351, 98 S. Ct. 2454 (1978), *quoting Catlin v. United States,* 324 U.S. 229, 233, 89 L. Ed. 911, 65 S. Ct. 631 (1945). In order to be final, a judgment must dispose of all claims as to all parties. *J.D. Pharmaceutical Distribs., Inc. v. Save-On Drugs & Cosmetics Corp.,* 893 F.2d 1201, 1208 (11th Cir. 1990).

Plaintiffs have reserved the right to appeal this

judgment as to their PSD Claims in this action. While Plaintiffs have dismissed their Non-PSD Claims with prejudice, they have not consented to judgment on their PSD Claims. Rather, they have stipulated to facts that obviate the need for trial under the legal standards for PSD announced by this Court. If Plaintiffs do not appeal, or if this Court's judgment is affirmed, the case will be over. There is clear precedent in this Circuit for this procedural means of achieving finality while preserving the losing party's right to appeal. *Distaff, Inc. v. Springfield Contracting Corp.*, 984 F.2d 108 (4th Cir 1993); *ITCO Corp. v. Michelin Tire Corp.*, 722 F.2d 42 (4th Cir. 1983). In addition, Duke Energy has stipulated that this final judgment is appealable by Plaintiffs pursuant to 28 U.S.C. § 1291 as of right with respect to the PSD Claims.

There remain four as-yet unresolved motions pending in this matter: Duke Energy's Rule 72(a) Objections (Docket No. 252) relating to documents containing certain UARG communications; UARG's Rule 72(a) Objections (Docket No. 251 and 281) concerning the same documents; Duke Energy's Motion To Strike Exhibits 166-176 (Docket No. 282); and Duke Energy's Motion for Sanctions (Docket No. 286). The Joint Stipulation resolves these matters. The parties and UARG have requested that the Court stay enforcement of the Orders of Magistrate Judge Eliason that were the subject of the Rule 72(a) Objections (Docket Nos. 164, 244 and 250), and stay any further consideration of the Rule 72(a) Objections, without prejudice to seeking enforcement of the Orders or reviving the Objections in the event that the case is remanded after appeal. Plaintiff has agreed to withdraw the documents that are the subject of the Motion To Strike, and has agreed that the disputed UARG documents will not be part of the record on any appeal of this Order. Duke Energy has agreed to withdraw the Motion To Strike, without prejudice, and Duke Energy has agreed to withdraw the Motion for Sanctions, with prejudice.

Accordingly, it is hereby ORDERED that:

1. Summary judgment is granted in favor of Defendant Duke Energy on Plaintiff's and Plaintiff-Intervenors' PSD claims in this action. Plaintiffs and Plaintiff-Intervenors have reserved the right to appeal this determination.

2. Plaintiff's and Plaintiff-Intervenors' Non-PSD Claims are hereby voluntarily dismissed, with prejudice. Plaintiff and Plaintiff-Intervenors have not reserved the right to appeal this voluntary dismissal.

3. Defendant Duke Energy's counterclaims are hereby dismissed, without prejudice to their being revived in the event of a remand following an appeal.

4. Enforcement of Magistrate Judge Eliason's Orders regarding certain UARG documents (Docket Nos. 164, 244 and 250) is hereby stayed. Consideration of Duke Energy's Rule 72(a) Objections (Docket No. 252) and UARG's Rule 72(a) Objections (Docket No. 251 and 281) is hereby stayed. In the event of a remand after appeal of this judgment, Plaintiff and Plaintiff-Intervenors may seek to lift the stay of enforcement of Magistrate Judge Eliason's Orders and Defendant and UARG may seek a lift of the stay of consideration of the Objections.

6. Duke Energy's Motion for Sanctions (Docket No. 286) has been withdrawn, with prejudice.

7. Duke Energy's Motion To Strike (Docket No. 282) has been withdrawn without prejudice to re-file the Motion in the event that the case is remanded after appeal and Plaintiffs obtain and seek to resubmit the subject documents.

8. The Parties shall comply with the terms of their stipulations as described above.

9. All claims and counterclaims having been disposed of in this action, Final Judgment is accordingly hereby entered pursuant to Rule 58.

SO ORDERED

April 14, 2004

FRANK W. BULLOCK, JR.
United States District Judge

STATUTORY AND REGULATORY PROVISIONS

Clean Air Act

Section 101 [42 U.S.C. § 7401]

Congressional findings and declaration of purpose

* * * * *

(b) Declaration. The purposes of this subchapter are –

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution prevention and control programs.

(c) Pollution prevention. A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention.

Section 111 [42 U.S.C. § 7411]

Standards of performance for new stationary sources

(a) Definitions. For purposes of this section:

* * * * *

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

* * * * *

Section 161 [42 U.S.C. § 7471]

Plan requirements

In accordance with the policy of section 7401(b)(1) of this title, each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality in each region (or portion thereof) designated pursuant to section 7407 of this title as attainment or unclassifiable.

Section 169 [42 U.S.C. § 7479]

Definitions

For purposes of this part –

(1) The term "major emitting facility" means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary

sources: fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities. Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

* * * * *

(2)(C) The term "construction" when used in connection with any source or facility, includes the modification (as defined in section 111(a)) of any source or facility.

* * * * *

Section 304 [42 U.S.C. § 7604]

Citizen suits

(a) Authority to bring civil action; jurisdiction. Except as provided in subsection (b) of this section, any person may

commence a civil action on his own behalf –

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a limitation,

* * * * *

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

* * * * *

(b) Notice. No action may be commenced –

(1) under subsection (a)(1) of this section –

* * * * *

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

* * * * *

Section 307 [42 U.S.C. § 7607]

Administrative proceedings and judicial review

* * * * *

(b) Judicial review.

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 112, any standard of performance or requirement under section 111, any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1), any determination under section 202(b)(5), any control or prohibition under section 211, any standard under section 231, any rule issued under section 113, 119, or under section 120, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), any order under section 111(j), under section 112, under section 119, or under section 120, or his action under section 119(c)(2)(A), (B), or (C) (as in effect before the date of enactment of the Clean Air Act Amendments of 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 114(a)(3) of this Act, or any other final action of the Administrator under this Act (including any denial or disapproval by the Administrator under title I) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review

of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

* * * * *

(e) Other methods of judicial review not authorized. Nothing in this Act shall be construed to authorize judicial review of regulations or orders of the Administrator under this Act, except as provided in this section.

* * * * *

Code of Federal Regulations, Title 40

Part 51—Requirements for Preparation, Adoption, and Submittal of Implementation Plans

Subpart I--Review of New Sources and Modifications

§ 51.166 Prevention of significant deterioration of air quality.

40 C.F.R. § 166 (1987)

(b) Definitions.

(1)(i) "Major stationary source" means:

(a) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Act: Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants, fossil fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(b) Notwithstanding the stationary source size specified in paragraph (b)(1)(i)*(a)* of this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of any air pollutant subject to regulation under the Act; or

(c) Any physical change that would occur at a stationary source not otherwise qualifying under paragraph (b)(1) of this section, as a major stationary source if the change would constitute a major stationary source by itself.

* * * * *

(2)(i) "Major modification" means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.

* * * * *

(iii) A physical change or change in the method of operation shall not include:

(a) Routine maintenance, repair, and replacement;

* * * * *

(f) An increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 C.F.R. 52.21 or under regulations approved pursuant to 40 C.F.R. Subpart I or § 51.166.

* * * * *

(3)(i) "Net emissions increase" means the amount by which the sum of the following exceeds zero:

(a) Any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and

(b) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

* * * * *

(8) "Construction" means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in actual emissions.

* * * * *

(21)(i) "Actual emissions" means the actual rate of emissions of a pollutant from an emissions unit, as determined in accordance with paragraphs (b)(21)(ii) through (iv) of this section.

(ii) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. The reviewing authority may allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

* * * * *

Part 60—Standards of Performance for New Stationary Sources

Subpart A—General Provisions

§ 60.14 Modification.

40 C.F.R. § 60.14 (1987)

(a) Except as provided under paragraphs (e) and (f) of this section, any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies shall be considered a modification within the meaning of section 111 of the Act. Upon modification, an existing facility shall become an affected facility for each pollutant to which a standard applies and for which there is an increase in the emission rate to the atmosphere.

(b) Emission rate shall be expressed as kg/hr of any pollutant discharged into the atmosphere for which a standard is applicable....

* * * * *

(e) The following shall not, by themselves, be considered modifications under this part:

(1) Maintenance, repair, and replacement which the Administrator determines to be routine for a source category, subject to the provisions of paragraph (c) of this section and § 60.15.

(2) An increase in production rate of an existing facility, if that increase can be accomplished without a capital

expenditure on that facility.

(3) An increase in the hours of operation.

(5)

No. 05-848

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In the Supreme Court of the United States

ENVIRONMENTAL DEFENSE, ET AL., PETITIONERS

v.

DUKE ENERGY CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

In this enforcement action under the Prevention of Significant Deterioration (PSD) provisions of the Clean Air Act (CAA), the court of appeals held that the Environmental Protection Agency (EPA) must interpret certain PSD regulations construing the statutory term "modification" in a manner consistent with EPA's regulations construing that term in the separate New Source Performance Standards (NSPS) program. The questions presented are:

1. Whether the court of appeals lacked jurisdiction by virtue of Section 307(b) of the CAA, 42 U.S.C. 7607(b), which provides that nationally applicable regulations that EPA issues to implement the CAA may be reviewed only through properly filed petitions for review, not in enforcement actions.

2. Whether the CAA requires EPA to interpret the statutory term "modification" consistently in its PSD and NSPS regulations.

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v.

DUKE ENERGY CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 411 F.3d 539. The opinion of the district court (Pet. App. 22a-84a) is reported at 278 F. Supp. 2d 619, and an earlier order is reported at 171 F. Supp. 2d 560.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 2005. Petitions for rehearing were denied on August 30, 2005 (Pet. App. 20a-21a). On November 17, 2005, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 28, 2005, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In this enforcement action, the United States alleged that Duke Energy Corporation (Duke) failed to comply with the Prevention of Significant Deterioration (PSD) requirements of the Clean Air Act (CAA) when it undertook refurbishment projects at coal-fired power plants in North and South Carolina. Petitioners intervened as plaintiffs. On cross-motions for summary judgment, the district court agreed with Duke's view of the types of projects that constitute "modifications" subject to the PSD program. The Fourth Circuit affirmed. Pet. App. 1a-19a.

1. The Clean Air Act was enacted "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. 7401(b)(1). It directs the Environmental Protection Agency (EPA) to promulgate National Ambient Air Quality Standards (NAAQS) specifying allowable concentrations of air pollutants. 42 U.S.C. 7409. States in turn must develop plans to achieve and maintain NAAQS. 42 U.S.C. 7410.

The CAA establishes various additional programs to protect air quality. The PSD program, a part of the larger New Source Review (NSR) program, imposes various requirements that must be satisfied when certain emissions sources are "constructed." 42 U.S.C. 7475(a). The PSD provisions define "construction" to include "modification," which is defined in turn by reference to the statutory provisions for the separate and distinct New Source Performance Standards (NSPS) program. 42 U.S.C. 7479(2)(C) ("The term 'construction' * * * includes the modification (as defined in [the NSPS provisions]) of any source or facility."). The NSPS provisions define the term "modification" as "any physical change in, or change in the method of operation of, a stationary source

which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. 7411(a)(4).

Although NSPS and PSD are related in some respects, they have certain differences. The NSPS program, enacted in 1970, directs EPA to promulgate technology-based performance standards for new or modified facilities in certain categories. 42 U.S.C. 7411. Those standards are based on application of the best demonstrated system of emission reduction and apply regardless of the actual effect of a source's emissions on local air quality. *Ibid.* By contrast, Congress enacted PSD in 1977 to prevent a significant decline of air quality in areas where ambient air quality standards were being met. 42 U.S.C. 7470. Unlike NSPS, the PSD program focuses directly on the effect of new construction and modification on local air quality. 42 U.S.C. 7470(1), 7475(a)(3).

Although PSD and NSPS share the statutory definition for the term "modification," EPA has issued regulations interpreting components of that definition differently for the two programs. As relevant, the PSD regulations applicable here differed from existing NSPS regulations on how to measure whether a "change" at a facility "increases" emissions and thus constitutes a modification under 42 U.S.C. 7411(a)(4). The NSPS regulations issued in 1975 considered a change's effect on maximum hourly emission rates (measured in kilograms per hour), while the PSD regulations issued in 1980 considered total annual emissions (tons per year).[1] Compare

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[1] The PSD regulations applicable to most of the projects at issue were promulgated in 1980 and recodified in 1986. 45 Fed. Reg. 52,676 (1980); 51 Fed. Reg. 40,656 (1986). Some projects are subject to regulations from 1992, 57 Fed. Reg. 32,314, but the differences are not material here. EPA issued new PSD regulations in 2002 that continue to focus on total annual emissions, not maximum hourly emission rates. 67 Fed. Reg. 80,186; see 68 Fed. Reg. 61,248 (2003). On October 20,

40 C.F.R. 60.14(b) (1976) (NSPS), with 40 C.F.R. 51.24(b)(2), (3), (21) and (23) (1981) (PSD). Thus, under the 1975 and 1980 regulations, a change that would lead to an increase in a unit's hours of operation without changing the hourly emissions rate is a modification under PSD but not NSPS.

2. In December 2000, the United States brought suit against Duke for the alleged failure to comply with PSD requirements in conducting certain refurbishment projects. C.A. App. 49-126. Three private groups (petitioners in this Court) intervened as plaintiffs. *Id.* at 153. On cross-motions for summary judgment, the district court issued an opinion adopting legal standards to govern further proceedings. Pet. App. 22a-84a. Of note here, the court held that the PSD requirements apply only when a unit's maximum hourly emission rate increases, regardless of whether total annual emissions increase. *Id.* at 58a-75a. The court's analysis was driven largely by the conclusion that Congress in 1977 incorporated then-existing NSPS regulations into the statutory definition of "modification" for PSD. *Id.* at 62a-67a; see *id.* at 39a-42a. To permit immediate appeal, the United States and the plaintiff-intervenors stipulated that they did not contend that Duke's projects resulted in increases in maximum hourly emission rates, only in hours of operation. C.A. App. 1405-1406. The district court thus entered final judgment for Duke. Pet. App. 87a-95a.

3. The Fourth Circuit affirmed. Pet. App. 1a-19a. It held that Congress's decision to define "modification" in the PSD statutory provisions by cross-reference to the NSPS statutory provisions requires EPA to interpret the term consistently in the two programs. *Id.* at 11a. The court concluded that its statutory analysis was dictated by this Court's decision in

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2005, however, EPA proposed to revise the emissions test for existing electric generating units subject to PSD to adopt a test similar to the NSPS test. 70 Fed. Reg. 61,081. See pp. 8-9, *infra*.

Rowan Cos. v. *United States*, 452 U.S. 247 (1981). Pet. App. 11a-18a. The court stated that it was not invalidating the 1980 PSD regulations but rather merely mandating that the *same* interpretation—at present, the interpretation that has long been embodied in the NSPS regulations—be used for both the PSD and NSPS regulations. *Id.* at 15a n.7. The court thus ruled that EPA must interpret the definition of "modification" in the 1980 PSD regulations to require an increase in a unit's maximum hourly emission rate. *Id.* at 18a-19a. Because the United States and the plaintiff-intervenors did not contend that Duke's projects had caused such an increase, the court affirmed. *Ibid.* The court subsequently denied petitions for rehearing en banc, in which the United States and the plaintiff-intervenors contended that the court of appeals overstepped its authority by reviewing nationally applicable CAA regulations and that its analysis of the CAA was unfounded. *Id.* at 20a.

ARGUMENT

Petitioners identify neither a square conflict among the courts of appeals nor any persuasive justification for plenary review by this Court. Further review is not warranted.

1. Petitioners seek review first on the question whether the court of appeals exceeded its authority by reviewing the validity of nationally applicable CAA regulations in this enforcement action. In Section 307(b)(1) of the CAA, Congress directed that petitions for review that challenge the promulgation of nationally applicable CAA regulations or standards may be filed only in the D.C. Circuit, and only within 60 days of their promulgation. 42 U.S.C. 7607(b)(1). Congress further specified that "[a]ction of the Administrator with respect to which review could have been obtained [in the D.C. Circuit in a proper petition for review] shall not be subject to judicial review in civil or criminal proceedings for enforcement." 42

U.S.C. 7607(b)(2). Because this case is an enforcement action, was not filed in the D.C. Circuit, and began well more than 60 days after the PSD regulations in question were promulgated, the court of appeals did not have authority to review the regulations.

The court of appeals recognized that principle. It stated: "no question as to the validity of the PSD regulations is (or could be, *see* 42 U.S.C. § 7607(b)) presented here." Pet. App. 15a n.7. The court styled its holding as one regarding the proper interpretation of the 1980 PSD regulations, not their validity.[2] *Ibid.*; see *id.* at 18a. Thus, although petitioners claim that the decision below conflicts with the decisions of other courts of appeals holding that Section 307(b) provides the exclusive process for the review of nationally applicable CAA regulations (Pet. 14-15 & nn.7-8), the Fourth Circuit's decision presents no such conflict.

There remains the question whether the court of appeals, having expressly and correctly recognized the force of Section 307(b), nonetheless violated that provision by adopting an interpretation of the 1980 PSD regulations that is inconsistent with the regulatory text. The court of appeals did not dispute that it was bound by the regulatory text, but it held that the 1980 PSD regulations can be interpreted to employ the NSPS test for considering what constitutes an emissions "increase" —that is, a test based on a comparison of maximum hourly

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[2] Petitioners provide no support for the notion (Pet. 19-20) that EPA's interpretation of the 1980 PSD regulations itself constituted a "final action" under Section 307(b). Although petitioners note (Pet. 20) that Duke could have sought an administrative determination from EPA as to whether PSD requirements applied to the projects at issue and that EPA's resulting determination would have constituted such a final action, see *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 586-594 (1980), Duke sought no administrative determination and thus none was at issue in this case.

rates of emissions rather than total annual emissions. Pet. App. 15a n.7. Petitioners contend (Pet. 17-19 & n.9) that such an interpretation is inconsistent with the regulatory text, and that as a result the court of appeals overstepped its authority.

The court of appeals' holding that the 1980 PSD regulations can in fact be interpreted to adopt the NSPS emissions test does not merit further review. EPA issued new NSR regulations in 2002 that supersede the 1980 PSD regulations for activities occurring after the effective date of the 2002 regulations. 67 Fed. Reg. 80,186 (2002). States are required to adopt the 2002 regulations or some alternative at least as stringent. 42 U.S.C. 7471, 7502. Therefore, as the D.C. Circuit recently observed in upholding the relevant provisions of the 2002 regulations, "[f]or planning purposes the 1980 rule appears moot." *New York* v. *EPA*, 413 F.3d 3, 20-21 (2005) (emphasis omitted). For the same reason, the question whether those regulations can be interpreted to adopt the NSPS emissions test has no continuing importance for activities occurring in the future.

In addition, although the 2002 NSR regulations are similar to the 1980 PSD regulations in that they focus on total annual emissions, not maximum hourly emission rates, 40 C.F.R. 51.166(b)(2), (3), (21) and (23) (2003), EPA has recently proposed new NSR rules for electric generating units. Those rules would establish a test for measuring emissions increases that is similar to the NSPS test. 70 Fed. Reg. 61,081 (2005).[3]

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[3] The emissions test for PSD purposes under the proposed rules "is the same as that in the New Source Performance Standards (NSPS) program." 70 Fed. Reg. at 61,081. The proposed regulation "would establish a uniform emissions test nationally under the NSPS and NSR [including PSD] programs for existing" electric generating units. *Ibid.* At the same time, EPA is seeking public comment on a number of alternatives and related issues. See *ibid.*

Thus, the Fourth Circuit's view as to the proper interpretation of the 1980 regulations is of limited practical import now.[4]

2. Petitioners also seek review of the question whether the court of appeals erred in holding that the CAA requires EPA to interpret the statutory term "modification" consistently in its PSD and NSPS regulations. Petitioners identify no square conflict between the Fourth Circuit's statutory holding and the holding of any other court of appeals. In particular, although petitioners identify decisions that are in tension with the Fourth Circuit's decision, none addressed the particular theory of statutory interpretation that the Fourth Circuit adopted. For instance, in its recent decision in *New York* v. *EPA*, *supra*, the D.C. Circuit rejected the argument that Congress in 1977 incorporated then-existing NSPS regulations into the PSD statutory provisions but found that the parties had waived the argument that the CAA required EPA to use the same definition of "modification" under both regulatory programs. 413 F.3d at 19-20; see *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 400-402 (D.C. Cir. 1979) (allowing different emissions "increase" tests in PSD and NSPS without directly addressing the theory of statutory interpretation adopted by the Fourth Circuit).

Petitioners also argue (Pet. 27-29) that the Fourth Circuit's statutory holding is exceptionally important, and they emphasize that EPA referred to the court of appeals' decision in recently proposing new NSR rules for electric generating units that would establish a test for measuring emissions increases similar to the NSPS test. See 70 Fed. Reg. at 61,083.

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[4] Petitioners contend that the Fourth Circuit's interpretation of the 1980 PSD regulations is "contrary to analysis" in decisions by other courts of appeals (Pet. 19), but not that it conflicts with any other court's holdings. The decisions that petitioners cite do not address the particular question of statutory interpretation that the Fourth Circuit found controlling.

EPA made clear that, while it "continue[s] to respectfully disagree with the Fourth Circuit's decision" in this case and "continue[s] to believe that [it] ha[s] the authority to define "modification" differently in the NSPS and NSR programs," it "believe[s] that [proposing a set of revised rules] is an appropriate exercise of [its] discretion." *Id.* at 61,083 n.3.[5] Far from indicating that this Court's review is necessary, the fact that EPA has proposed new regulations indicates that the agency believes it can address any difficulties caused by the court of appeals' decision through rulemaking, and obviates any need for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2006

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[5] For purposes of the proposed rulemaking, EPA noted the relevance of "the substantial emissions reductions from other CAA requirements that are more efficient than major NSR," and it also noted that "[t]he current major NSR approach discourages sources from replacing components, and encourages them to replace components with inferior components or to artificially constrain production in other ways," practices that do "not advance the central policy goals of the major NSR program." 70 Fed. Reg. at 61,083. EPA stated that "[t]he central policy goal is not to limit productive capacity of major stationary sources, but rather to ensure that they will install state-of-the-art pollution controls at a juncture where it otherwise makes sense to do so." *Ibid.*

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IN THE

Supreme Court of the United States

ENVIRONMENTAL DEFENSE, ET AL.,
Petitioners,

v.

DUKE ENERGY CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Duke Energy Corporation states that it has no parent company and that no publicly held company owns 10% or more of its stock.

Duke Energy has announced its intention to merge with Cinergy Corporation. Cinergy has no parent company and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

In this Clean Air Act ("CAA") enforcement action, the U.S. Environmental Protection Agency ("EPA") and Petitioners (Intervenors below) allege that long-ago completed repair and replacement projects at Duke Energy Corporation's existing power plants violated the 1980 Prevention of Significant Deterioration ("PSD") rules. The district court and the Fourth Circuit had before them three interpretations of these rules, each of which had been advanced *by EPA* itself at some point in this program's lengthy regulatory history. The Fourth Circuit rejected EPA's enforcement interpretation, and affirmed the district court's application of EPA's contemporaneous interpretation of the 1980 rules. This case is not worthy of review.

First, there is no conflict between the court's construction of the rules and those of other courts of appeals. The district court's construction, which the Fourth Circuit affirmed, in fact relied on the Seventh Circuit's decision that Petitioners claim presents a conflict,[1] and the D.C. Circuit explicitly declined to review EPA's interpretation of the 1980 rules.[2] Nor does the court's statutory construction present a conflict. The only other court squarely presented with the particular statutory construction issue that the Fourth Circuit resolved flatly refused to "express [any] opinion" as to that construction.[3]

Second, the issues addressed by the Fourth Circuit are squarely before lower courts in other circuits in pending cases involving similar projects at existing utility units. Accordingly, there is no current conflict among the circuits, and it would be premature for this Court to consider the questions at issue here before they have worked their way through the lower courts. Given this, it is not surprising that the principal plaintiff below – the Government – did not seek certiorari.

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[1] *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990).

[2] *New York v. EPA*, 413 F.3d 3, 21 (D.C. Cir. 2005).

[3] *Id.* at 20.

Third, Petitioners' jurisdictional point does not warrant review. The Fourth Circuit did *not* invalidate the rule and thus did not "invade" the jurisdiction of the D.C. Circuit. The court reviewed the interpretation of the rules asserted by EPA in an enforcement action brought by EPA in the Middle District of North Carolina. The principle of regulatory construction applied by the Fourth Circuit to determine the meaning of the 1980 rules is well established: an interpretation of a rule that is inconsistent with the statute is entitled to no deference. For this reason, the court rejected EPA's enforcement interpretation of the 1980 rules and affirmed the district court's application of EPA's own contemporaneous construction of those rules.

There is no conflict among the circuits as to whether an agency's interpretation of a CAA rule is subject to review in an enforcement action. In fact, the circuit courts that considered a similar issue reached the same conclusion as the Fourth Circuit here. In addition, the basis of Petitioners' jurisdictional argument is their disagreement with the merits of the court's decision. As discussed above, Petitioners' mere disagreement with the EPA construction of the rules adopted by the court does not warrant review.

STATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND.

This case involves the application of rules promulgated 25 years ago (1980 PSD rules) pursuant to statutory provisions enacted 28 years ago (1977 CAA Amendments), which incorporated statutory definitions enacted 35 years ago (1970 CAA Amendments). An understanding of the more than 30-year statutory and regulatory history of new source programs is essential to the review of the petition in this case.

A. Existing Source Programs.

Congress in 1970 directed EPA to develop National Ambient Air Quality Standards ("NAAQS") to protect the

public health and welfare with an adequate margin of safety. 42 U.S.C. §7409.[4] The states, in turn, develop State Implementation Plans ("SIPs"), setting source-by-source emissions limits to meet the NAAQS. *Id.* §7410.[5] These limits are premised on a permitted source operating at its maximum emitting capacity (*i.e.*, all year at maximum production capacity) without exceeding the NAAQS.[6]

B. New Source Programs.

1. The New Source Performance Standards ("NSPS") program did not regulate existing emissions capacity.

The 1970 Amendments also directed EPA to issue NSPS to minimize the impact of adding new emissions capacity.[7] Congress debated whether to subject existing emissions capacity to NSPS, but chose not to do so.[8] Thus, NSPS apply only to new sources—*i.e.*, newly-constructed emission units or "modifications" of existing units. *Id.* §7411(a)(2) ("new source" is one on which "construction or modification ...is commenced after" a given date). Modification is defined as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." *Id.*

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[4] *See also Train v. NRDC*, 421 U.S. 60, 66-67 (1975).

[5] *See also Union Elec. Co. v. EPA*, 427 U.S. 246, 249-50 (1976).

[6] *See, e.g., Cleveland Elec. Illuminating Co. v. EPA*, 572 F.2d 1150, 1160 (6th Cir. 1978) ("The model [used to calculate required SIP limits] is operated on the assumption that the plants concerned operate 24 hours a day at full capacity and predictions are made for every day of the year.").

[7] "The legislative history of §111 [NSPS] ... reveals that Congress was most concerned that new plants—new sources of pollution—would have to be controlled to the greatest degree practicable if the national goal of a cleaner environment was to be achieved." *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 434 n.14 (D.C. Cir. 1973).

[8] *See* S. Rep. No. 91-1196, at 15-17 (1970), *reprinted in* Legal Compilation: Statutes and Legislative History, EPA (1973) (noting the high cost and difficulty of installing new control technologies on existing sources).

§7411(a)(4).

The NSPS regulatory definition of "modification" promulgated in 1971 tracked the statutory definition almost verbatim. 36 Fed. Reg. 24,876, 24,877 (Dec. 23, 1971). The rules further specified that "[r]outine maintenance, repair, and replacement shall not be considered physical changes," and a "change in the method of operation" does not include: (1) an "increase in the production rate ... [within the facility's] operating design capacity;" (2) an "increase in hours of operation;" or (3) the "use of an alternative fuel" that the facility was "designed to accommodate" before a given date. *Id.* (codifying 40 C.F.R. §60.2(h)). Thus, under these rules, only activities that increase a facility's design emitting capacity triggered NSPS.[9]

In 1975, EPA revised the NSPS rules to "clarify the phrase ... 'increases the amount of any air pollutant'" in the statutory and general regulatory (40 C.F.R. §60.2) definition of "modification." EPA stated this phrase refers to an increase "in emission rate," which the regulations "expressed as kg/hr." 40 Fed. Reg. 58,416, 58,419 (Dec. 16, 1975). As EPA explained, the use of this measurement unit clarified that the modification rule would be sensitive to "increased production capacity and to overall increases in total emissions to the atmosphere" (*i.e.*, to *new* capacity to emit), while "*automatically* allow[ing] increases in operating hours as intended by one of the existing exemptions under 40 C.F.R. §60.2(h)." 39 Fed. Reg. 36,946, 36,947 (Oct. 15, 1974) (emphasis added). Thus, EPA recognized, the existing exclusion in the NSPS rule for increased "hours of operation" by definition meant that only activity that increased the facility's existing *hourly* emissions rate—*i.e.*, its actual emitting capacity—is a "modification" under §111 of the Act.

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[9] The NSPS provisions were "designed to prevent new air pollution problems." *National Asphalt Pavement Ass'n v. Train*, 539 F.2d 775, 783 (D.C. Cir. 1976); *see also* H.R. Rep. No. 1146, at 3 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5356, 5358.

2. *The New Source Review ("NSR") programs adopted the NSPS concept of "modification."*

a. Congress adopted the NSPS "modification" concept into the 1977 statutory NSR program.

In 1977, Congress further amended the CAA by enacting two more new source programs: the PSD and Non-Attainment New Source Review (NNSR) programs.[10] Basically, the 1977 Amendments codified a then-existing 1974 *regulatory* PSD program.[11] In doing so, Congress specifically considered the various provisions of the regulatory program and decided to "tighten[]" some of them. *See Ala. Power*, 636 F.2d at 349-50. Congress did *not*, however, change the applicability provisions of these regulations (which were the same as NSPS); it simply incorporated the NSPS definition of modification into the NSR definition of modification.

Thus, Congress defined "modification" under NNSR to "mean the same as the term 'modification' *as used* in section 7411(a)(4) [NSPS]." 42 U.S.C. §7501(4) (emphasis added).

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[10] PSD applies to all new emissions capacity in areas meeting the NAAQS (attainment areas), while NNSR applies to all new emissions capacity in areas not meeting the NAAQS (non-attainment areas). Here, EPA had alleged violations of PSD because the areas in North and South Carolina where Duke's plants operate were in attainment for all relevant pollutants during the periods of interest. This brief refers to the NSPS, PSD, and NNSR programs collectively as the "New Source programs." It refers to the PSD and NNSR programs together as "NSR."

[11] 42 U.S.C. §7478(a) ("Until such time as an applicable implementation plan is in effect ... which ... meets the requirements of this part ... applicable regulations under this chapter prior to August 7, 1977 shall remain in effect ... except as otherwise provided in subsection (b)"). Prior to Congress' amending the Act to include NSR requirements, EPA—prompted by a court's preliminary injunction—had promulgated rules adopting a PSD program. *See generally Ala. Power Co. v. Costle*, 636 F.2d 323, 346-49 (D.C. Cir. 1979) (describing the statutory and regulatory history of PSD). EPA specified that the "general definition of modified source" in its PSD rules was meant to be "consistent with the definition used in Part 60 [*i.e.*, NSPS]." 39 Fed. Reg. 42,510, 42,513 (Dec. 5, 1974).

As originally enacted, the PSD program referred only to the "construction" of major sources, and not to "modification" as did the NNSR program. Three months later, Congress fixed this oversight by adding "modification" as defined under NSPS to the "construction" activity subject to PSD. *See id.* §7479(2)(C) ("The term 'construction' ... includes the modification (as defined in section 7411(a) [NSPS] ...).").

In support of this "technical amendment," Congress explained that it intended to incorporate the "usage" of the NSPS definition of "modification."[12] EPA has repeatedly acknowledged that "[t]he phrase 'usage in other parts of the Act' ... refers, not only to section 111(a)(4), but also to the EPA regulations implementing section 111 that were in effect at that time."[13]

b. The 1980 PSD rules incorporated the NSPS concept of "modification."

EPA's 1978 PSD rules defined "major modification" as a "physical change [or] change in the method of operation" which "increases the *potential emission rate*" (in tons per year) of regulated pollutants from a "major stationary source."

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[12] 123 Cong.Rec. 36331 (1977) (technical amendments "[i]mplement[] conference agreement to cover 'modification' as well as 'construction' by defining 'construction' in Part C to conform to usage in other parts of the Act."). Congress emphasized it was "not the purpose of these [technical] amendments to re-open substantive issues in the [CAA]." 123 Cong.Rec. 36252 (1977). Congress had resolved the substantive issue of the applicability of the new statutory NSR programs to existing units by leaving the applicability provisions of the 1974 PSD regulations unchanged and providing that "modification" under NSR is the same "as used" under the pre-existing NSPS program.

[13] 49 Fed. Reg. 43,211, 43,213 (Oct. 26, 1984) ; see *also* 43 Fed. Reg. 26,380, 26,394 (Jun. 19, 1978); 68 Fed. Reg. 61,248, 61,269 (Oct. 27, 2003) (1977 CAA "refer[red] to our preexisting rules interpreting the term 'modification' in the NSPS context."); Pet. App. 35a-36a. *See also Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) ("Congress' *repetition* of a *well-established term* carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations.") (emphasis added).

43 Fed. Reg. at 26,403 (emphasis added). Because these rules assumed the same "potential" hours of operation before and after the change, only a change that increased an existing unit's hourly emissions rate (*i.e.*, an NSPS "modification") could trigger NSR. Virtually all of the 1978 rules, except that aspect of the definition of "major modification," were challenged. *See Ala. Power Co.*, 636 F.2d 323. In implementing the court's remand requiring a "bubble" concept for defining "source" under PSD,[14] the final 1980 rules defined "major modification" as "any physical [or operational] change ... of a major stationary source that would result in a significant net emissions increase" in the source's "actual emissions" (in tons per year).[15]

For there to be a "major modification," the 1980 PSD rules require that an increase in "actual emissions" in tons per year result from the proposed change. For existing units that have begun normal operations, "actual emissions" is defined by reference to "actual operating hours [and] production rate" for a historic (pre-change) period "which is representative of normal source operation." *Id.* §51.166(b)(21)(ii). That is, for these units, only one period of "representative" conditions is required to characterize those "normal source operations." Accordingly, post-project "actual emissions" must be calculated using the same "representative" conditions of operation (*i.e.*, hours of operation) that existed before the change. This is confirmed by the definition of "modification," which states that the "increase" in actual emissions must result *from* the "physical [or operational] change," which by definition excludes "[a]n increase in the hours of operation or

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[14] Under the "bubble" concept, the "source" subject to NSR is an entire plant, which may include several "emissions units." By contrast, each individual emissions unit is a separate "source" under NSPS.

[15] 40 C.F.R. §§51.166(b)(2)(i), (b)(3)(i), (b)(21). The NSR rules applicable here are the PSD rules adopted in the state SIPs, as approved by EPA. The applicability provisions of the state rules are identical to the federal 1980 PSD rules, 40 C.F.R. §51.166 (1987). All references to the 1980 PSD rules are to the 1987 C.F.R., except where otherwise noted.

in the production rate" (unless restricted by permit). *Id.* §51.166(b)(2)(iii)(f) (emphasis added).[16] Thus, as under all of the prior modification rules, a change at an existing unit would result in an increase in "actual emissions" *only* if it first increases the unit's hourly emissions rate—*i.e.*, *only* if it is a "modification" under NSPS, 42 U.S.C. §7411(a)(4).[17]

By contrast, for units that have *not* begun normal operations (*e.g.*, new units or completely reconstructed units), the 1980 rules require a different assumption for *post*-change operating hours: since the unit has no operating history, one must assume the full "potential to emit" (8,760 hours, unless hours were limited). *Id.* §51.166(b)(21)(iv). This *different* test for units that have not begun "normal operation" is known as the "actual-to-potential" test.

3. Implementation of the PSD program.

a. EPA's contemporaneous interpretation of "modification" in the PSD rules is consistent with the NSPS definition of "modification."

Shortly after finalizing the 1980 PSD rules, EPA confirmed that the definition of "net emissions increase" meant just what it said. *See* Pet. App. 58a-59a. In 1981, EPA confirmed that "PSD applicability [at a previously operating unit] is determined by evaluating any change in [hourly] emissions rates caused by" the physical or operational change under review. Letter of Reich, EPA, to Gill, General Elec. (June 24, 1981) ("GE Determination"), CA App. 234-41. Absent a change in the per-hour emission rate, EPA concluded, actual emissions "could increase only if there is an *increase in the*

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[16] The 1980 rules' preamble explains, "The *first step* ... is to determine whether the physical or operational change in question would *itself* result in an increase in 'actual emissions.'" 45 Fed. Reg. 52,676, 52,698 (Aug. 7, 1980) (emphasis added). "[T]hose phrases do not encompass ... any increase in the hours or rate of operation of a source, so long as the increase would require no change in any ... permit condition." *Id.*

[17] Pet. App. 58a-60a; *see WEPCo*, 893 F.2d at 918 n.14.

production rate or hours of operation, both of which are specifically exempt from PSD review." *Id.* (*citing* 40 C.F.R. §52.21(b)(2)(iii)(f)).[18] Therefore, the unit's production rate and hours of operation are kept constant in calculating an "emission increase" under the "actual-to-actual" test required by the 1980 PSD rules. *See* 40 C.F.R. §51.166(b)(2)(iii)(f).[19]

b. The *WEPCo* court rejected EPA's attempt to reinterpret the 1980 rules.

Only once in the 30-year history of new source programs before EPA's new "enforcement initiative" against coal-fired utilities did EPA determine that a power plant repair and replacement project would trigger PSD and NSPS.[20] In 1988, Wisconsin Electric Power Company ("WEPCo") proposed a "renovation" project at its Port Washington Plant, which had operated over 10 years at a maximum achievable *capacity* well below its original capacity. Mem. from Kee, EPA Region V, to Emison, EPA (Mar. 25, 1988), CA App. 256-57.[21] EPA found the replacements WEPCo proposed to increase "[p]lantwide capacity ... about 40 percent above current levels to 400 megawatts," *id.*, "highly unusual, if not unprecedented." Initial WEPCo Determination, CA App. 807. Given both the magnitude and uniqueness of these replacements, EPA determined WEPCo's project was not

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[18] This determination was consistent with a previous one dated January 22, 1981. Letter of Reich, EPA, to Whitmore, EPA Region VII (Jan. 22, 1981), CA App. 242-43 ("Cargill Determination"). In both determinations, physical and operational changes were being made to the units; these were not mere stand-alone increases in operating hours.

[19] 40 C.F.R. §51.166(b)(2)(iii)(f) is identical to §52.21(b)(2)(iii)(f) that the GE Determination cites. *See also* Pet. App. 41a n.11.

[20] *See* Mem. from Clay, EPA, to Kee, EPA Region V (Sept. 9, 1988) ("Initial WEPCo Determination"), CA App. 804-15; Letter from Thomas, EPA Adm'r, to Boston, WEPCo (Oct. 14, 1988), CA App. 248-55; Letter from Clay, EPA, to Boston, WEPCo (Feb. 15, 1989), CA App. 830-41.

[21] Several years before the proposed project, the WEPCo units had been formally "derated" from their full capacity of 80 MW each to operating capacities ranging from 49 MW to 78 MW. CA App. 256.

"routine maintenance, repair and replacement" within the exclusion provided under the NSPS rules and incorporated into the NSR rules. *Id.* The Seventh Circuit upheld that determination. *WEPCo*, 893 F.2d at 910-13.

Regarding emissions increase, EPA found an NSPS emissions increase at three WEPCo units. EPA, however, also found a PSD emissions increase at all five units, by comparing their actual annual emissions during a pre-repair representative period to their theoretical, maximum annual emissions (*i.e.*, "potential to emit"), derived by multiplying the units' maximum emissions rates by a full year (8,760 hours)—the "actual-to-potential" test.

The court upheld EPA's NSPS finding, but reversed EPA's PSD determination. Under the rules, the "potential to emit" concept plainly applies *only* to a "unit which has not begun normal operations." 40 C.F.R. §51.166(b)(21)(iv). Refusing to "defer to agency interpretations that ... appear to assume what they seek to prove," the court rejected EPA's circular reasoning—that, "in order to demonstrate that [WEPCo's] like-kind replacement project constitutes a modification," EPA "applies the potential to emit concept (to show an increase in emissions)," and, "in order to apply the potential to emit concept to like-kind replacement, the EPA assumes that the plant is a 'modified' unit." *WEPCo*, 893 F.2d at 917.

On remand, the court ordered EPA to determine "whether the renovated plant would cause a significant net emissions increase if it were operated *under present hours and conditions*," *id.* at 918 n.14 (emphasis added)—*i.e.*, calculate post-project emissions on the basis of the *restored* hourly emissions rate of the repaired plant under the actual hours and conditions of operation during the representative *baseline* period. By holding pre- and post-project hours and conditions constant at a level representative of normal operations, any "net emissions increase" could be due only to an increase in the units' hourly rates, not a result of more hours of operation. Thus, the court confirmed the rules' actual-to-actual emissions

test promulgated in 1980 and applied by EPA in 1981.[22]

c. EPA ignored the court's remand instructions in settling *WEPCo*.

On remand, EPA was precluded from applying the actual-to-potential test for the WEPCo units that had "begun normal operations."[23] But EPA refused to follow the court's remand instructions—that EPA determine on the basis of "present hours and conditions" whether WEPCo's project would result in an annual emissions increase—summarily dismissing them as "incorrect."[24] Instead, for settlement purposes and *with no reference to the regulatory language whatsoever*, EPA devised an emissions calculation methodology comparing the units' representative baseline annual emissions (*i.e.*, pre-project emissions) to their "estimated future actual emissions." Remand WEPCo Determination, CA App. 271-72. In the Initial WEPCo Determination, when WEPCo suggested such a test as an alternative argument, EPA categorically responded: "The [1980] PSD regulations provide no support for" an actual-to-projected-actual test. CA App. 810 n.4.

In the 1992 "WEPCo Rule," EPA promulgated a rule containing the new actual-to-projected-actual methodology for which the 1980 rules "provide no support." Significantly, EPA did not change the "base" 1980 rules governing emissions increase, and EPA made this new 1992 "actual-to-

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[22] After *WEPCo*, EPA abandoned its re-interpretation of the rule that the Seventh Circuit had rejected, explaining that "[a]t least for changes that are 'like kind replacements,' 'normal operations' have begun, and the *actual-to-potential test is impermissible*." 57 Fed. Reg. 32,314, 32,317 (Jul. 21, 1992) (emphasis added). Yet, here, EPA returned in its summary judgment papers to this discredited interpretation, only to abandon it again at the summary judgment hearing. *See* Pet. App. 58a n.17.

[23] Letter from Rosenberg, EPA, to Boston, WEPCo (Jun. 8, 1990) ("Remand WEPCo Determination"), CA App. 265-78.

[24] *Id.* at 270. Although EPA asked for an extension of time for filing a motion for clarification or reconsideration of the court's remand, *see* Foote Affidavit in *WEPCo* (CA App. 279-82), it never filed it, choosing instead simply to ignore the court's clear instructions. *See also* Pet. App. 70a.

projected-actual" test available only to utilities that elect to undertake additional reporting. 40 C.F.R. §§51.166(b)(21)(v) & (b)(32) (1993).[25] Otherwise, the activity would be evaluated using the emissions increase test of the 1980 rules.[26]

4. EPA Reverses Course In 1999.

Throughout the last three decades, the utility industry's maintenance practices—including component replacements sometimes referred to as "life extension"—were a matter of public knowledge. Before 1999, except for the unusual and unprecedented WEPCo project, no federal or state agency, or any environmental group for that matter, ever suggested that such projects triggered NSR. Indeed, as the district court recounted at length, EPA was fully aware of "life extension" practices as early as the 1980s. Pet. App. 50a n.13. EPA-directed studies, which were provided to Congress and formed the basis of the Acid Rain Program enacted in the 1990 CAA Amendments, assumed that existing coal-fired power plants would continue to operate at original capacity for 55 to 65 years on average, being "refurbished" around age 30, without being subject to New Source programs. *Id.*[27] After WEPCo, and throughout the 1990s, EPA continuously reaffirmed its

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[25] Thus, the WEPCo Rule's actual-to-projected-actual test may be used by electing utilities, even where a project increases an existing unit's maximum hourly emissions rate. *See* 57 Fed. Reg. at 32,324-26 (explaining the new test may be applied to *any* change at a utility, except the construction of a "greenfield" unit or the replacement of an existing one).

[26] Thus, after 1992, the NSR rules provided three emissions increase tests: (i) "actual-to-actual" for units that have begun normal operations; (ii) "actual-to-potential" test for units that have *not* begun normal operations; and (iii) "actual-to-projected actual," which can be used by certain operating utilities, provided they submit necessary reports. Recently, EPA promulgated new rules rewriting the NSR emissions increase provisions. *See* 67 Fed. Reg. 80,186 (Dec. 31, 2002). The parties agree this case is governed by the 1980 rules.

[27] *See also* "1989 EPA Base Case Forecasts" (ICF for EPA), Appendix C, CA App. 364-77; Letter from K. Schweers, ICF, to R. Beck, Edison Elec. Institute (July 26, 1989), CA App. 378-79.

position, telling industry and Congress most power plant projects and activities would not trigger NSR. *Id.* at 51a-52a.

Starting in 1999, EPA reversed course. It filed nine actions against midwestern and southern coal-fired utilities, including Duke Energy, and an administrative action against the Tennessee Valley Authority.[28] In the enforcement initiative, EPA alleged near universal non-compliance with NSR, claiming hundreds of utility repair and replacement projects over the past twenty years violated NSR.[29] According to EPA and Petitioners, Duke Energy misunderstood (or misapplied) the 1980 PSD rules for the past quarter of a century (and EPA, the States, and organizations such as petitioners were all asleep at the switch). Duke Energy defended on the ground that EPA was seeking in this enforcement action to re-write and apply, retroactively, new and unlawful interpretations of the 1980 PSD rules.

II. FACTUAL AND PROCEDURAL BACKGROUND

The court of appeals' and district court's decisions and orders state the relevant facts. *See* Pet. App. 5a-7a; 23a-31a, 50a-53a, 60a-62a; 87a-95a. These facts are summarized briefly below.

Duke Energy has provided electricity to North and South Carolina since the early 1900s. Its system includes nuclear, hydroelectric, gas-fired combustion turbine, and coal-fired plants. Duke Energy operates thirty coal-fired units at eight plants in the Carolinas. *Id.* at 22a, 24a. Virtually all of Duke Energy's coal-fired units are at issue here.

Each coal-fired unit consists of three primary components: the boiler, the steam turbine, and the generator. The boilers are large, building-like structures six to twenty stories tall, containing thousands of steel tubes in which water is heated to superheated steam with temperatures in excess of 900°F. In general, a boiler consists of collections of tube assemblies. *Id.*

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[28] *See* Dist. Ct. App. DX48-55 (complaints filed by United States).

[29] *See* CA App. 493-511 (projects alleged to violate NSR in all actions).

at 24a. Because these tubes are subject to corrosion and extreme pressures and temperatures, they periodically fail and must be repaired or replaced so that the utility can meet its statutory duty to provide the public a reliable electricity supply. *See, e.g.*, N.C.GEN.STAT. §62-2.

Here, EPA alleged that Duke Energy modified generating units at all eight of its coal-fired power plants without obtaining necessary PSD pre-construction permits. The earliest of the 29 targeted projects took place in 1988. Most of the projects consisted of replacing one or more of four boiler tube assemblies that had deteriorated due to normal wear and tear (*i.e.*, economizers, portions of waterwalls, superheaters and reheaters). *See* Pet. App. 24a-25a.

Most of the projects occurred during regularly-scheduled planned outages. During such outages, maintenance, repair and replacement tasks are performed inside the unit that cannot be performed during operation. These outages occur every 48-84 months, depending upon the unit's condition and load requirements of the system. Typically, outages are planned for spring or fall when electricity demand is lower, and they can last from several weeks to months. CA App. 518¶10.

The other projects at issue occurred during periods of "extended cold shutdown" ("ECS")—when the units were not needed to meet demand, but during which Duke Energy "made definitive plans for preserving and conditioning the units so that they could be returned to service when demand dictated." Pet. App. 27a-28a.

Some time after the units were placed in ECS, Duke Energy developed an enhanced maintenance program, the "Plant Modernization Program" ("PMP"). While separate projects were consolidated under PMP, the work was similar in nature to the boiler and turbine component repair and replacements commonly undertaken during regularly scheduled outages by Duke Energy (and industry generally). CA App. 559¶9.

During this period, Duke Energy was in frequent contact with state regulators and told them about the work to be done at its units. State regulators, who were responsible for

determining CAA compliance, regularly inspected Duke Energy's plants while the units were in ECS and PMP, and knew of the work being performed on them. The inspection reports uniformly certified the plants were *in compliance with all applicable air quality regulations*. CA App. 623-79 (collecting reports). For example, in the course of renewing the state permits for Duke Energy's Buck plant in 1987, the North Carolina regulator wrote that "Unit Nos. 3, 4 and 5 are currently in the plant modernization project (PMP) until 1989," and he explicitly noted "PSD, NSR, NSPS, and NESHAP do not apply." CA App. 654.

EPA was well aware of industry repair and replacement practices, including "the utility industry practice of engaging in life extension projects." Pet. App. 50a n.13. Indeed, EPA knew of specific Duke Energy life extension projects, and raised no questions about them. *See id.* In the last two decades, EPA conducted thousands of utility plant inspections.[30] EPA has visited plants *while* boiler component replacements were ongoing, but EPA never cited them even as potential violations of NSR. *Id.*

Although Duke Energy's existing units are not regulated as "new" sources, they are extensively regulated under the CAA. They have emission limits set to protect public health (with an adequate margin of safety) under the NAAQS, based on the conservative assumption that the units would operate at maximum capacity every hour in the year. *Supra* 3. In addition, they are regulated under (1) the CAA "Acid Rain" Program, which requires existing utilities to make further reductions in sulfur dioxide (SO_2) and nitrogen oxides (NO_x) emissions; (2) the "NO_x SIP Call Program" and the Clean Air Interstate Rule, which require additional reductions in utility SO_2 and NO_x emissions in the eastern half of the U.S., *see Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000); 70 Fed.

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[30] *See, e.g.*, EPA, *Profile of the Fossil Fuel Electric Power Generation Industry*, 123, 125 (Sep. 1997) http://www.epa.gov/compliance/resources/publications/assistance/sectors/notebooks/fossil.html.

Reg. 25,162 (May 12, 2005); and (3) North Carolina's 2002 Clean Smokestacks law, one of the nation's most stringent air emission control laws, N.C.GEN.STAT. §143-215.107D. Duke Energy's program to meet this new state law alone involves the installation of additional controls on most of its units at an expected cost of $1.5 billion. CA App. 523-24 ¶¶8-11.

None of Duke Energy's units have violated *any* of the emission limits or control requirements under these CAA and state programs. The parties have stipulated that none of the projects increased the maximum achievable hourly emission rate of *any* of the units. Pet. App. 88a-89a. That is, none of the projects at issue created *any* new or unregulated emissions at any unit. Rather, Plaintiffs' allegations below were "based *solely* on their contention that the projects would have been projected to result in increased *utilization* of the units at issue." *Id.* (emphasis added).[31]

On cross-motions for summary judgment, the court had before it three different interpretations of "actual emissions increase" under the 1980 PSD rules. Each of these interpretations had been advanced by EPA at one point in the regulatory history: (1) EPA's contemporaneous interpretation of the rules providing an "actual-to-actual" test (*see* Pet. App. 58a-60a); (2) an "actual-to-potential" interpretation that EPA announced as the basis for this enforcement action, but then abandoned later in the district court (*see id.* at 58a n.17); and (3) an "actual-to-projected-actual" interpretation, which EPA then asserted in this action. The court upheld EPA's actual-to-actual interpretation, finding it compelled by the rules' plain language,[32] and consistent with EPA's historic interpretation of the rules, the statute, and precedent. *Id.* at 58a-72a.

After reviewing the two interpretations of the rules that the

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[31] Duke Energy disputes this contention, and believes none of the projects resulted in an emissions increase, even under Plaintiffs' theories.

[32] Pet. App. 60a (also rejecting EPA's attempt "'under the guise of interpreting a regulation, to create *de facto* a new regulation.'") (quoting *Christensen v. Harris County*, 529 U.S. 576, 588 (2000)); *id.* at 70a (EPA's enforcement interpretation is "[n]owhere in the regulations.").

parties pressed on appeal, the Fourth Circuit agreed with EPA that the "critical first 'question at issue'" was "whether the EPA 'can interpret the statutory term "modification" under PSD differently from how EPA interpreted that term' in the NSPS." Pet. App. 10a-11a (quoting U.S. Brief at 1). Because the answer was no, and Plaintiffs' litigation interpretation of the 1980 PSD rules rendered those rules inconsistent with the NSPS rules defining "modification," the unanimous panel (Judges Motz, Luttig, and Wilson—by designation) concluded that interpretation must be rejected in favor of EPA's contemporaneous interpretation that makes the two regulatory programs consistent, as Congress intended.

REASONS FOR DENYING THE WRIT

I. THE FOURTH CIRCUIT'S CONSTRUCTION OF THE RULES AND THE STATUTE IS NOT INCONSISTENT WITH THOSE OF OTHER COURTS OF APPEALS OR THIS COURT.

The Fourth Circuit construed in this case the 1980 PSD rules, as applied to Duke Energy's existing units—units that had long ago "begun normal operations." The court rejected the Plaintiff's litigation position, and affirmed instead EPA's own contemporaneous interpretation of these rules (*see supra* 8-9). That construction is not contrary to any other court of appeals' construction of these rules.

Puerto Rican Cement Co. v. EPA, 889 F.2d 292 (1st Cir. 1989) did not address the 1980 rules for units that *have* begun normal operations. The very first sentence of that opinion explains, the "Company wishes to build a *new* cement kiln, replacing older kilns ...." *Id.* at 293 (emphasis added). A *new* kiln is a unit that has *not* begun normal operations, and for which the actual-to-potential test plainly applies under the 1980 rules. As then-Judge Breyer observed, "[T]here is no logical contradiction in rules that, on the one hand, permit firms using *existing* capacity simply to increase their output and, on the other, use the potential output of *new* capacity as a

basis for calculating an increase in emissions levels." *Id.* at 298 (underlines added). But, that is neither disputed by the Fourth Circuit nor contrary to its construction of the 1980 rules for units that have begun normal operations. *Cf. WEPCo*, 893 F.2d at 917 n.12 ("unlike the case at issue here, *Puerto Rican Cement* involved the construction of a *new* emissions unit at an existing source.") (underlines added).

The Seventh Circuit in *WEPCo* rejected EPA's attempt to interpret the rules as requiring an actual-to-potential test for units that had begun normal operations. *Id.* at 917. The court's remand instructions were clear: NSR is triggered for existing units that have begun normal operations where "the renovated plant would cause a significant net emissions increase *if it were operated under present hours and conditions*"—*i.e.*, if hours of operation were held constant. *Id.* at 918 n.14 (emphasis added). This is the actual-to-actual test applied by EPA in 1981, adopted by the district court, and affirmed by the Fourth Circuit. Indeed, given that the district court discussed *WEPCo* at length and *relied* on it in part to reach its construction of the 1980 rules, Pet. App. 67a-70a, Petitioners' argument that the decision below is contrary to *WEPCo* defies credulity.

Contrary to Petitioners' claim, nothing the D.C. Circuit said in *New York* conflicts with the Fourth Circuit's construction of the 1980 rules or the statute. The D.C. Circuit stated: "*We express no opinion* as to whether Congress intended to require that EPA use identical regulatory definitions of modification across the NSPS and NSR programs. *Cf.* [*Duke Energy*]." *New York*, 413 F.3d at 20 (emphasis added).

Despite this express acknowledgement, Petitioners strain to identify a conflict between *Duke Energy* and *New York*. They fail. *New York* principally addressed the lawfulness of the revised NSR rules promulgated by EPA in 2002, rules that were not at issue in this case and to which the Fourth Circuit did not speak at all. And while industry petitioners challenged EPA's contention in the preamble of the 2002 rule that, "[p]rior to today, the [1980 PSD] regulations applied ... an

actual-to-potential applicability test for all ... emissions units,"[33] the D.C. Circuit explicitly declined to reach that issue as well, finding it not ripe for review and best addressed in a more concrete factual setting. According to the court, "[i]f there are still pending applications of the 1980 rule in which EPA attempts to employ the disputed" interpretation, "judicial proceedings addressed to the application could solve the problem of any affected firm." *Id.* at 21. That is precisely what the Fourth Circuit did here. In short, the D.C. Circuit did not adopt *any* interpretation of the 1980 PSD rules, much less one in "conflict" with the court's decision here. It specifically left the debate over the meaning of the 1980 rules for resolution in the local circuits in the enforcement context.

Unable to find a conflict between the Fourth Circuit and other circuits on the actual issue before the court below (*i.e.*, the meaning of the rules), Petitioners claim the court's reasoning (*i.e.*, its application of statutory construction principles) presents such a conflict and is inconsistent with this Court's teachings on statutory construction. Petitioners are wrong.

Both courts below recognized that, in some circumstances, courts – indeed the Fourth Circuit itself – have agreed that EPA may define the same term differently under PSD and NSPS. *See* Pet. App. 16a-18a (discussing *PEPCo v. EPA*, 650 F.2d 509 (4th Cir. 1981) and *Northern Plains Res. Council v. EPA*, 645 F.2d 1349 (9th Cir. 1981)); Pet. App. 64a-67a (discussing *Alabama Power Co. v. Costle*, 636 F.2d 323, 401 (D.C.Cir. 1979) and *Northern Plains*). But they both explained that these courts' decisions turned on the fact that *Congress* had defined the terms at issue there ("source" in *PEPCO* and *Alabama Power*, and "commenced" in *Northern Plains*) *differently* under PSD than NSPS. Here, by contrast, Congress explicitly "linked the PSD definition of the term

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[33] *See* 67 Fed. Reg. at 80,199. Notably, that is an interpretation *different* from the actual-to-projected-actual interpretation EPA advanced simultaneously before the Fourth Circuit, further undercutting Petitioners' claim of the court's rejection of EPA's "authoritative" interpretation.

[modification] to its use in the NSPS provisions of the statute." Pet. App. 17a.

Nor did the Fourth Circuit ignore or misconstrue this Court's precedents. The court recognized that the task of statutory construction, as "holistic [an] endeavor"[34] as it may be, does not start with the court's (or the parties') conception of the "different purposes" of PSD and NSPS. Rather, that task starts with the language of the statute, *see e.g.*, *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002), and the "different purposes of the NSPS and PSD programs cannot override [Congress'] mandate" as expressed in the statute.[35] Pet. App. 17a-18a; *cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) ("In our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.") (internal quotation and citation omitted).

The court below expressly recognized that while "the same word or phrase will generally be presumed to have the same meaning when used in different parts of the statute," that "'presumption ... relents' when there is 'a variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.'" Pet. App. 17a (quoting *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 (2004)). Indeed, the court explained, decisions like *PEPCO*

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[34] *Koons Buick-Pontiac GMC v. Nigh*, 125 S. Ct. 560, 566-67 (2004), *quoted in* Pet. at 25.

[35] The district court explained that construing the PSD and NSPS modification rules congruently such that PSD is triggered only if there is NSPS modification activity at an existing *unit*, and then only if the *source-wide* annual emissions exceed a de minimis threshold, is not only consistent with the statutory text and intent but also effectuates the air quality purposes of PSD and thus "does not ignore the objectives of each program." Pet. App. 64a. As EPA agrees, the structure of the CAA makes clear that NSR is *not* an emission reduction program for existing sources, but rather a program to manage emissions "*growth*" (*i.e.*, new emissions). 69 Fed. Reg. 23,951, 23,986 (Apr. 30, 2004) (emphasis added).

and *Northern Plains* illustrate that principle. *Id.* But the court looked here, as it must, at the particular statutory language at issue, and it recognized that this language is different from the language construed in those cases, and must be given effect. It correctly concluded that, as this Court's decision in *Rowan* illustrates, it means something when Congress does not merely use the same term in different parts of the statute but also defines that single term in substantially the same way.[36] Pet. App. 11a-15a (discussing *Rowan Cos. v. United States*, 452 U.S. 247 (1981)). It defies common sense to conclude in such circumstances that despite Congress' identical statutory definition of that single term, the agency can give that term two different meanings. This reasoning is even stronger here.

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[36] Contrary to Petitioners' claim, the similarities between this case and *Rowan* are not only that Congress defined the same term the same way in two related parts of the statute. The *Rowan* Court noted that Congress chose the concept of "wages" as the "base" for measuring tax obligations, and used substantially the same language to define that concept—first in 1938 in FICA and FUTA, and then seven years later in the income tax withholding statute. Here, in 1970, Congress chose the concept of "modification" as the "base" for the type of activity that would transform an existing unit into a new one under NSPS. Seven years later, Congress made NSPS "modification" a trigger for pre-construction review of an existing unit under NSR. As *Rowan* held, "[i]n view of this sequence of consistency, the plain language of the statutes is strong evidence that Congress i[n]tended [the commonly defined term] to mean the same." 452 U.S. at 255. If there is a difference between *Rowan* and this case, it is that the plain language of the CAA, incorporating by reference the NSPS definition of modification into NSR, is "even stronger evidence" that Congress intended the term to be interpreted consistently. Pet. App. 14a.

The court also confirmed the legislative history "does not in any way suggest that Congress intended these identical statutory definitions to receive different interpretation," and "indicates congressional concern with the same sort of simplicity and consistency" evident in *Rowan*. *Id.* at 14a-15a. Finally, EPA's contemporaneous construction of the statute's PSD provisions is reflected in the 1978 rules, which defined "modification" under PSD congruently with NSPS, *see supra* 6-7, as did EPA's contemporaneous construction of the 1980 PSD rules, *see supra* 8-9. *Cf. Rowan*, 452 U.S. at 253 (discussing the agency's contemporaneous interpretation of the statute).

It defies common sense even more for petitioners to argue that by expressly stating in one part of the statute that a term means the same as in another part of the statute, Congress meant to authorize the agency to give that term *different* meanings.

The language of the statute is plain: for an activity at an existing unit to trigger PSD pre-construction review, it must be a "modification []as defined in section 7411." 42 U.S.C. §7479(2)(C). It is only under these circumstances that the Fourth Circuit held that if Congress' words in the statute are to be given effect, the presumption of uniform usage had become "effectively irrebutable." Pet. App. 18a.

Despite the Fourth Circuit's invitation, Petitioners have still failed to cite "a single case in which any court has held that identical statutory *definitions* can be interpreted differently by the agency charged with enforcement of the statute." Pet. App. 18a. *Gen. Dynamic Land Systems* and *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001), plainly do not fit that category. The fact is that only one other court was squarely presented with the particular statutory construction issue that the Fourth Circuit resolved.[37] That court flatly refused to engage the issue. *See New York*, 413 F.3d at 20. There is no conflict for this Court to resolve.

II. CERTIORARI SHOULD NOT BE GRANTED BECAUSE THIS CASE INVOLVES AN ISSUE THAT IS PERCOLATING IN THE LOWER COURTS.

Petitioners' claims that this case presents "recurring issues of national importance" are based primarily on their assertions that (1) the Fourth Circuit's decision is inconsistent with that of other circuits—an assertion that is clearly incorrect as discussed in section I, *supra*; and (2) that the Fourth Circuit

[37] It is not surprising that there is no precedent addressing the particular issue of statutory construction presented here. The language of the CAA, in which Congress explicitly and by cross-reference adopted a pre-existing definition of a term (here "modification") for a new program, is to our knowledge unique. This fact also counsels against certiorari in this case.

exceeded its jurisdiction—an assertion that is also clearly incorrect, as discussed in section III, *infra*.

Petitioners also note that EPA recently proposed a further amendment of the PSD rules that would adopt provisions consistent with the Fourth Circuit's construction of the rules. 70 Fed. Reg. 61,081 (Oct. 20, 2005). Contrary to Petitioners' suggestion, *see* Pet. at 27-29, EPA's recent action counsels against this Court granting certiorari and devoting its own scarce resources to reviewing the Fourth Circuit's decision. That is particularly true here because EPA's legal rationale for the proposed revision to the PSD rules does *not* rely on the Fourth Circuit's decision or reasoning (rather EPA reiterates its disagreement with it). *See* 70 Fed. Reg. at 61,098-101, 61,090. Nor does EPA's policy rationale for the proposed rule rely on the *Duke Energy* decision. *See id.* at 61,093-95.[38] EPA's proposed rule, once finalized, will rise or fall on EPA's legal and policy rationale for the rule, irrespective of whether this Court decides to review the *Duke Energy* decision.

Petitioners nevertheless insist the meaning of the 1980 PSD rules "will retain considerable importance" because these rules will continue governing numerous projects undertaken before their amendment. Pet. at 29 n.15. Even if that were true, it is no reason for this Court to grant review. Petitioners identify several pending actions in which the issues decided by the Fourth Circuit in this case are squarely before district courts in different circuits. To date, two of these courts have issued interlocutory orders ruling on the issue here. *United*

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[38] EPA explained: "We believe it is desirable to change the approach to major NSR. The current approach discourages sources from replacing components, and encourages them to replace components with inferior components or to artificially constrain production in other ways. This behavior does not advance the central policy goals of the major NSR program as applied to existing sources. ... We also do not believe the outcomes produced by the approach we have been taking [*i.e.*, the interpretation reflected in the enforcement initiative] have significant environmental benefits compared with the approach we are proposing today." 70 Fed. Reg. at 61,094.

States. v. Ala. Power Co., 372 F.Supp.2d 1283 (N.D. Ala. 2005), followed *Duke Energy*, adopting EPA's contemporaneous interpretation of the 1980 PSD rules. *United States v. Cinergy* reached a contrary conclusion and adopted EPA's new actual-to-projected-actual test. The Seventh Circuit recently granted Cinergy's motion for interlocutory appeal. 384 F.Supp.2d 1272, 1274 (S.D. Ind. 2005), *appeal docketed*, No. 06-8029 (7th Cir. Jan. 3, 2006). Accordingly, the issue addressed by the Fourth Circuit is percolating in the different circuits, though there is currently no conflict among them. For this reason alone, even if Petitioners were correct that the issue the Fourth Circuit decided is a "recurring" one, this fact counsels *against* Supreme Court review in the context of this case. *See, e.g., Brown v. Texas*, 522 U.S. 940 (1997) ("the likelihood that the issue will be resolved correctly may increase if this Court allows other tribunals to serve as laboratories in which the issue receives further study before it is addressed by this Court") (internal quotation and citation omitted).

III. THE FOURTH CIRCUIT DECISION TO REJECT EPA'S ENFORCEMENT INTERPRETATION OF THE 1980 RULES AND AFFIRM INSTEAD THE DISTRICT COURT'S APPLICATION OF EPA'S CONTEMPORANEOUS INTERPRETATION OF THESE RULES PRESENTS NO CONFLICT AND WAS WITHIN THE COURT'S JURISDICTION.

Petitioners argue at length that the Fourth Circuit exceeded its jurisdiction by "invalidat[ing]" the 1980 PSD rules. Pet. at 13. This argument is based on a false premise. The court did *not* invalidate the rules. While 42 U.S.C. §7607(b) provides that challenges to nationally applicable CAA rules may only be brought in the D.C. Circuit, the enforcement action brought by EPA against Duke Energy did not involve a challenge to any rule. Rather, at issue was the permissibility of the interpretation of the 1980 PSD rules on which EPA based its claims of liability in a case brought in the Middle District of

North Carolina, an issue that, on appeal, may be resolved *only* in the Fourth Circuit. 42 U.S.C. §7413(b); 28 U.S.C. §1291.

The district court and the Fourth Circuit had before them three different interpretations of "actual emissions increase" under the PSD rules. These interpretations had each been advanced by EPA previously. *See supra* 8-12 & n.26. Of these interpretations, the Fourth Circuit, like the district court, upheld the "actual-to-actual" interpretation, the interpretation that EPA had announced almost contemporaneously with its promulgation of 1980 PSD rules. The court explained: "Our choice of this interpretation of the PSD regulations—as required by statute—over the EPA's interpretation is not an invalidation of those regulations. The PSD regulations remain fully intact and enforceable" under EPA's contemporaneous interpretation, which is fully consistent with the statute. Pet. App. 15a n.7. Petitioners have presented no compelling reasons for certiorari.

First, Petitioners half-heartedly suggest a conflict, citing myriad cases for the proposition that the court's decision here is "an abrupt departure" from other courts of appeals that "have held that contentions that CAA regulations are contrary to statute are cognizable in the D.C. Circuit, and are barred from enforcement proceedings," Pet. at 14 & n.7, n.8. These cases are inapposite. The vast majority of these cases did not involve an agency's *interpretation* of the rule, as was the case here.[39] None held an agency's interpretation of its rule is

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[39] In their zeal to locate decisions from multiple circuits that purportedly support their contention, Petitioners cite cases that are hardly relevant to the issue here. *Enviro Tech Int'l, Inc. v. EPA*, 371 F.3d 370 (7th Cir. 2004), was a FOIA case, involving no challenge to any rule or its interpretation. Several cases involved untimely, collateral attacks on permits or final agency action, not a regulation or its interpretation. *See Chemical Weapons Working Group, Inc. v. U.S. Dep't of the Army*, 111 F.3d 1485, 1492 (10th Cir. 1997) (collateral attack on RCRA permit); *Hawaiian Elec. Co. v. EPA*, 723 F.2d 1440, 1445 (9th Cir. 1984) (untimely challenge to PSD permit); *Pan Am. Grain Mfg. Co., v. EPA*, 95 F.3d 101, 103 (1st Cir. 1996) (untimely challenge to nonattainment designation); *Greenpeace, Inc. v. Waste Tech. Indus.*, 9 F.3d 1174, 1180 (6th Cir. 1993)

reviewable only in the D.C. Circuit.[40] Petitioners fail to cite the *only* other circuit decision that generally presents facts similar to this case. That decision reached the *same* conclusion as the Fourth Circuit below. *See League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1190 n.8 (9th Cir. 2002) (stating, in response to an argument similar to Petitioners' here, "we do not invalidate the regulation. Rather, we reject the [agency's] interpretation of the regulation and give it a construction consistent with its administrative history, case law, and the governing statute"); *id.* at 1190 ("An agency simply may not interpret a regulation in a way that contravenes a statute.").

For the same reason, the Fourth Circuit's decision here is not in "tension," much less conflict, with this Court's decision in *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978), where the Court looked at the rule itself and held that rule altogether outside the ambit of §7607(b). No claim that

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(collateral attack on RCRA permit). Two cases involved direct attacks on the validity of regulations and merely recognized, as did the Fourth Circuit here, Pet. App. 15a n.7, that such attacks must be addressed to the D.C. Circuit. *See United States v. Kung-Shou Ho*, 311 F.3d 589, 607-08 (5th Cir. 2002) (refusing to entertain a defendant's procedural challenge to a regulation); *United States v. Walsh*, 8 F.3d 659, 664 (9th Cir. 1993) (noting that defendant challenged the rules themselves *and* the limitation on review set forth in 42 U.S.C. §7607(b)). Petitioners even misquote one case, claiming that *Siegelman v. EPA*, 911 F.2d 499 (11th Cir. 1990), stands for the proposition that a "claim that 'EPA's regulation conflicts with an act of Congress' may not be entertained in enforcement proceeding." Pet. at 14 n.7. That case in fact says the opposite: "we do have the jurisdiction to consider the argument that EPA's regulation conflicts with an act of Congress," *Id.* at 502 n.6.

[40] Petitioners cite only one case involving a challenge to an agency's interpretation of the rules. While Petitioners cite that court's unremarkable footnote noting the company in that case did not challenge the validity of the NSPS rules and that the court, in that event, would not have had jurisdiction to entertain such a challenge, *see WEPCo*, 893 F.2d at 914 n.6, they fail to note that defendant in that case challenged the interpretation of the 1980 PSD rules that EPA sought to apply and the court set it aside. *See id.* at 918 (rejecting EPA's "actual-to-potential" interpretation).

the 1980 rules are not subject to §7607(b) has been made here.

Second, Petitioners' attack on the court's construction of the 1980 rules in the course of their ostensible argument based on §7607(b) reveals that argument for what it is: not a jurisdictional argument, but merely a disagreement with the Fourth Circuit's decision on the merits. The fundamental premise of Petitioners' argument is found in a footnote: that the district court's construction of the rules that the Fourth Circuit affirmed is inconsistent with the rules' language. Pet. at 17 n.9. According to Petitioners, the court effectively invalidated the rules because they *cannot* be read consistently with NSPS, which "targets 'emissions rates' measured in kilogram per hour whereas the PSD regulations address 'actual emissions' in 'tons per year.'" Pet. at 18.

Contrary to Petitioners' contention, the Fourth Circuit did not construe the 1980 rules as mandating a maximum hourly emissions rate test to the exclusion of an annual emissions test. *See* Pet. at 19. The court affirmed the district court's (and EPA's contemporaneous) construction, which explicitly held that to be a PSD "modification," "Duke['s] projects [must] cause[] an increase in *annual* net emissions, assuming constant hours and conditions." Pet. App. 83a (emphasis added); *see WEPCo*, 893 F.2d at 918 n.14. Thus, an annual net emissions increase can result only from an increase in the hourly emissions rate, Pet. App. 58a-59a, and only NSPS "modifications" can be also PSD "modifications." This construction is required by the statute, as the Fourth Circuit held. It is also consistent with the plain language of the rules and the *WEPCo* remand instructions. *See id.* at 58a-60a, 67a-69a.

Regardless, that Petitioners disagree with the court below on the merits is no reason for this Court to grant review, for the reasons discussed earlier in Parts I and II.

Third, Petitioners are simply wrong on the merits. That the Fourth Circuit relied primarily on the statute for its rejection of EPA's (and Petitioners') interpretation of the 1980 rules in favor of EPA's own contemporaneous interpretation of these rules does not turn the court's ruling into an "invalidation" of

the rules. Rather, it is a straightforward application of this Court's "often stated" admonition that deference is due to an agency's regulatory interpretation that is not plainly erroneous or inconsistent with the rules "*provided* [that interpretation] does not violate the Constitution or a *federal statute*." *Stinson v. United States*, 508 U.S. 38, 45 (1993) (emphasis added). The Fourth Circuit, faced with multiple EPA interpretations of the 1980 PSD rules, thus recognized that the first step in discharging its duty in this case – *i.e.*, determining which EPA interpretation might command the deference that this Court's decisions require – is to determine which of these interpretations is consistent with the statute.[41] *See* Pet. App. 10a-11a. The court correctly deemed it unnecessary to proceed beyond that first step when it determined that only one of EPA's interpretations—the contemporaneous interpretation upheld by the district court—is consistent with the statute.[42]

In short, the court's review of EPA's enforcement interpretation falls squarely within its jurisdiction. Whereas the D.C. Circuit has jurisdiction to review the validity of nationally applicable CAA rules, the Fourth Circuit has jurisdiction to review the validity of regulatory interpretations that EPA asserts in actions arising in the Fourth Circuit.[43]

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[41] Both EPA and Petitioners "expressly acknowledge[d] ... these principles" in their briefs below, and EPA conceded that "the critical first 'question at issue'" was the consistency of its interpretation of the regulation with the statute. Pet. App. 10a-11a. It was not until the court requested supplemental briefing that the Plaintiffs claimed that answering that "critical first question" somehow violates 42 U.S.C. §7607(b).

[42] The district court also relied on the statute, *see* Pet. App. 63a-64a (citing *Stinson*), but went on to explain EPA's enforcement interpretation of the 1980 rules was inconsistent with their plain language, *id.* at 58a-60a.

[43] *See United States v. Ohio Department of Highway Safety*, 635 F.2d 1195, 1197 n.2 (6th Cir. 1980) ("[The rule] was not challenged by a petition for review. Thus, we treat it as a lawful regulation and are concerned only with the proper interpretation of the regulation ...."); *see also PEPCo v. EPA*, 650 F.2d 509, 513 (4th Cir. 1981) ("This court ... has jurisdiction to review only the EPA's interpretation of those regulations ...."); *Forsgren*, 309 F.3d at 1190 n.8.

Finally, Petitioners' statement that "authoritative" interpretations of the regulation are subject to §7607(b)(2) is wide off the mark. First, if Petitioners' argument is correct, no district court would have any authority to engage in any review of the agency's interpretation for that case; the court must simply take the agency's litigation position at face value – even if that interpretation is plainly inconsistent with the regulatory language – and mechanically apply it to the case at hand. That is not, and never has been, the law.

Second, *what is* EPA's "authoritative" interpretation of the 1980 PSD rules? Petitioners ignore EPA's contemporaneous interpretation and blithely assert EPA's "formal" interpretation was announced, and upheld, in the *WEPCo* matter. Pet. at 7-8. In fact, the "actual-to-potential" interpretation that EPA advanced in WEPCo was *rejected* by the Seventh Circuit and was acknowledged by EPA itself as impermissible in 1992. *Supra* 10-11 & n.22. Moreover, the "locally applicable" final agency action that was reviewed, and set aside, in *WEPCo* was EPA's PSD applicability determination in that case.

Section 7607(b) requires prompt challenges to nationally applicable CAA rules in the D.C. Circuit and other final actions in the regional circuits. It does not provide a means for EPA to promulgate ambiguous rules, change its interpretations at will, and claim that whatever interpretation it chooses to apply in a given enforcement case is immune from review.

As the Fourth Circuit explained, it scrupulously followed the requirements of the CAA, reviewing the interpretations presented to it by the parties and *not* the validity of the rules. Pet. App. 15a n.7. This is a straightforward application of the statute. Certiorari is not warranted.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court of the United States

ENVIRONMENTAL DEFENSE, ET AL.,
Petitioners,

v.

DUKE ENERGY CORP., ET AL.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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The petition demonstrated that the Fourth Circuit violated Section 307(b) by invalidating national CAA regulations that the D.C. Circuit, exercising its "exclusive" review authority under the Act, upheld. See *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005) (*New York I*). As we also showed (Pet. 12, 22, 25-26), the court's holding conflicts directly with *New York* on a critical issue by construing the CAA unambiguously to *forbid* EPA from using an actual, annual emissions test for PSD emissions increases – the test *New York* construed the Act unambiguously to *require* for PSD.

Neither brief in opposition seriously engages these points, let alone rebuts them. Duke takes the Court on a meandering tour of what it claims to be the regulatory history, the apparent purpose of which is to make the basic issues of statutory construction actually presented seem hopelessly complex, and it tries to redraft a Fourth Circuit ruling that declared the "wording" of the EPA's NSR regulations "largely irrelevant" in the face of an "effectively irrebuttable" rule of statutory construction. See Pet. App. 11a n.3, 18a. Duke nowhere explains why it did not properly raise a challenge based on *Rowan Cos., Inc. v. United States*, 452 U.S. 257 (1981), in the D.C. Circuit, the court with exclusive authority to declare the regulations' validity or invalidity under the Act – nor why its failure to do so should expand the authority of another court.

The United States' brief is remarkable for its studied failure *even to address* what its petition for rehearing en banc acknowledged to be a direct conflict between *New York I* and the Fourth Circuit's decision: the former construes the Act's unambiguous text to command that PSD emissions "increases" be measured by actual (as opposed to potential) emissions, while the latter construes the statute to forbid it. And despite having admitted that the Fourth Circuit's decision poses "serious consequences for EPA's ability to maintain a consistent and fair regulatory scheme," and "undermines critical aspects of the PSD rules," U.S. En Banc Pet., No. 04-1763 at 14, *and* having unsuccessfully sought

rehearing en banc review of *New York I*'s ruling that the Act's plain text requires an actual emissions test for PSD, the government now asserts that the decision below, however wrong, is unworthy of review – because "the agency believes it can address any difficulties caused by the court of appeals' decision through rulemaking." Opp. 9. But EPA's bare proposal to promulgate regulations "to establish a test consistent with" a ruling it regards as a misconstruction of the Act, see 70 Fed. Reg. 61081, 61083 & n.3 (Oct. 20, 2005), only underlines the need for this Court's review. The D.C. Circuit's *New York I* decision and the decision below bind EPA to conflicting mandates on the "actual" versus "potential" measures of emissions, each based on respective courts' readings of the Act's unambiguous terms. EPA cannot satisfy both as a matter of logic, and review by this Court offers the only opportunity to remedy the systematic disarray that the ruling below has caused and, unreviewed, will continue to cause.

1. Although Duke insists that the court of appeals was merely engaged in interpretation of the PSD regulations, the court itself considered "the wording and various interpretations of the PSD regulations" as "largely irrelevant to the proper analysis of this case," Pet. App. 11a n.3, because the Act's "plain language" required that the components of the Act's definition of modification must "be interpreted identically" in EPA's regulations implementing the two programs. Pet. App. 14a, 17a. See Pet. 8, 18-19; U.S. Opp. at 3 & n.1 (acknowledging that the NSPS regulations measure emissions increases by reference to "maximum hourly emissions rates" and the 1980 and 2002 PSD regulations turn on "total annual emissions (tons per year)"). As the United States correctly explained below, "requiring EPA to interpret the PSD regulations to adopt the NSPS test for measuring emissions increases is inconsistent with the plain language of the regulations and thus is not 'interpretation' at all, but rather invalidation." U.S. En Banc Pet., No. 04-1763 at 12. See

also NPCA Amicus Br. 4-11.[1] The PSD regulations, which nowhere mention maximum hourly rates, cannot be "interpreted" to provide for the NSPS-style potential emissions test; and even if their plain language did not rule it out, such a move would directly contravene the D.C. Circuit's insistence that the Act precludes a test based on potential emissions. *New York*, 413 F.3d at 38-40; *Alabama Power v. Costle*, 636 F.2d 323, 353 (D.C. Cir. 1979). See also *New York v. EPA*, 2006 WL 662746, *6 (D.C. Cir. March 17, 2006) ("*New York II*") (in striking down EPA's 2003 Equipment Replacement Rule, observing that "[t]o the extent industry intervenors [including Duke, and represented by Duke's counsel here] rely on the NSPS regime to reargue their position that 'modifications' require an increase in maximum emissions rates, that issue was resolved in *New York I*, 413 F.3d at 19-20, 40; see also *New York v. EPA*, 431 F.3d 801, 802-803 (D.C. Cir. 2005) (Williams, J., concurring in denial of rehearing)").

Having called the Fourth Circuit's action what it plainly was – "invalidation" of national CAA regulations in an enforcement action – and having foreseen "disarray" as a result, U.S. En Banc Pet., No. 04-1763 at 15, the United

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[1] Straining to resist Duke's diversionary exercise in serial bamboozlement, we pause to note that its account of the 1980 regulations (Opp. 7-8) willfully conflates the separate "emissions increase" and "physical change" prongs of the modification test. See 40 C.F.R. 51.166(b)(2) (1987); see also *New York II*, 2006 WL 662746, *6. The "increased hours of operation" exemption provides that increased hours alone do not constitute a physical change – not that where there *has* been a physical change, increases in actual emissions resulting from more hours of operation can be ignored, in violation of the D.C. Circuit's repeated holdings that increased actual emissions *cannot* be ignored by PSD, see *New York I*, 413 F.3d at 38-40; see also *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901, 916 n.11 (7th Cir. 1990); *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292, 913-16 (1st Cir. 1990). As Duke concedes (Opp. 4), an hourly rate test "automatically" ignores emissions from increased hours. The hourly rate test imposed by the Fourth Circuit would deprive the exemption of any meaning

States now says review is not warranted because of the figleaf-shaped footnote, App. 15a n.7, in which the court *claimed* to respect the limit on its jurisdiction. (The United States ignores the court's other, figleaf-removing footnote, App. 11a n.3.) But as this Court recognized in *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 285 (1978), Section 307(b)'s strictures are not limited to acknowledged usurpations, and a footnoted ipse dixit does not alter the "disarray" that necessarily attends invalidation-in-deed of national CAA rules upheld by the D.C. Circuit. States that must administer complex pollution control programs in conformity EPA's regulations depend on the rules' stability and predictability. See States' Amicus Br. at 12-15.[2]

2. In *New York I*, the court rejected the argument that EPA's 1980 and 2002 PSD/NNSR regulations violated the Act by diverging from pre-1977 NSPS regulations that allegedly used a "maximum hourly emissions" test. 413 F.3d at 19-20. Thus, in a Section 307(b) "exclusive" review proceeding, the D.C. Circuit upheld the same regulations the court below struck down as contrary to the CAA.[3]

Respondents are left to point out that the D.C. Circuit did

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[2] The conflict between the Fourth Circuit and the D.C. Circuit's rulings is already causing enormous confusion among regulators and regulated alike. This confusion extends to the 2002 PSD regulations governing current operations and planning, as well as the 1980 and 1992 regulations applicable to the class of massive enforcement cases like this one, because all use an actual, annual test, rather than the potential, hourly emissions standard the Fourth Circuit required. See *infra* at 10; U.S. Opp. 3 n.1.

[3] Industry petitioners including Duke Energy unsuccessfully sought rehearing in *New York I* on the basis that that "the reasoning and analysis" of the Fourth Circuit's decision "compel" that the D.C. Circuit strike down the 1980 and 2002 regulations. Utility Air Regulatory Group En Banc Pet., No. 02-1387 at 1; *New York II*, 2006 WL 662746, *6 (rejecting industry intervenors' (including Duke's) effort to "reargue" their NSPS-based argument). Duke's plea for more "percolating" (Opp. 22) must be understood as a euphemism for using enforcement proceedings to try to bamboozle *other* courts into disregarding the D.C. Circuit's role under Section 307(b) and its repeated holdings on what the Act's PSD provisions unambiguously require

not address the argument based on *Rowan* because that argument had been waived. Yet even they cannot deny that the D.C. Circuit reached its opposite and irreconcilable result construing the exact same statutory text construed by the Fourth Circuit. Under Section 307(b), the D.C. Circuit's unqualified upholding of the 1980 and 2002 regulations on PSD emissions increases is the definitive word on their validity (absent review by this Court, for which the time has now expired). The result is a very real conflict: national regulations held valid by the D.C. Circuit were held invalid in another circuit, on broad statutory grounds that apply to every vintage of PSD regulations. As the United States noted below (U.S. En Banc Pet. 11), these conflicting rulings are "precisely" what Section 307(b) was "enacted to prevent."

3. Respondents have *no answer* to the direct conflict (see Pet. 8, 22, 25-26) between *New York I*'s square holding that the statute requires use of an "actual emissions" standard for PSD, and the Fourth Circuit's ruling that the same statutory text forbids that test, or indeed any standard not identical to the NSPS "potential" hourly emissions test. The Fourth Circuit's holding that EPA must use the NSPS maximum hourly rate measure for the PSD program – based on that court's view that "'Congress has directly spoken to the precise question at issue," App. 10a & App. 11a n.3 (quoting *Chevron, USA, Inc. v. NRDC*, 467 U.S. 837, 842 (1984)) – is directly inconsistent with the D.C. Circuit's holding in *New York*, *also* based on "*Chevron* Step 1," "that the CAA unambiguously defines 'increases' in terms of actual emissions." 413 F.3d at 39. See also *id.* at 40 ("the plain language of the CAA indicates that Congress intended to apply NSR to changes that increase actual emissions instead of potential or allowable emissions"). Accord *Alabama Power*, 636 F.2d at 400.[4] The NSPS "maximum hourly rate"

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[4] Contrary to Duke's claim (Br. 19) the D.C. Circuit's ruling in *Alabama Power* that the term "source," which occurs in both the NSPS and PSD modification definitions, must be interpreted differently for PSD than

standard is a test of *potential* emissions, whereas the "actual, annual" PSD test invalidated here is a test of actual emissions, and the choice between them has enormous implications, in many cases determining whether the PSD program will even apply. See *New York I*, 413 F.3d at 14-15; 45 Fed. Reg. at 52680 (contrasting annual "'actual emissions'" and hourly "potential to emit" standards); U.S. Opp. Br. 3 & n.1, 7 n.3.

Indeed, the two courts' divergent answers to how Congress meant EPA to measure PSD emissions increases – both *"Chevron I"* rulings based on the Act's "unambiguous" language – led the United States, in seeking rehearing en banc in this case, to observe that the Fourth Circuit had held that the Act "mandates" that EPA use the same test of emissions increases in PSD regulations as it uses for NSPS, while the D.C. Circuit held that the Act "mandates a contrary interpretation." U.S. En Banc Pet., No. 04-1763 at 10-11; *id.* at 11 (quoting *New York I*'s holding that "'the CAA unambiguously defines emissions increases in terms of actual emissions"). EPA's 2005 notice likewise acknowledges, albeit less directly, the clash between the two courts' rulings.[5]

NSPS did not turn on different language in the statutory definitions. In fact, the court held, in conflict with the Fourth Circuit here, that, although the statutory definition of "stationary source" applicable under PSD is the same as the NSPS statutory definition found in 42 U.S.C. 7411(a)(3), EPA could employ different regulatory definitions due to "differences in the purpose and structure of the two programs." 636 F.2d at 401-02. Although Duke trumpets (Br. 22) that the Petitioners have "not found a single case that allows an agency to interpret 'identical statutory definitions'" differently, it needs look no further that *Alabama Power*, which did so with respect to the very statutory definitions at issue. See also *New York*, 413 F.3d at 19, 39-40; U.S. Opp. 8.

[5] Compare 70 Fed. Reg. at 61100 (*New York I* "held that the language of the CAA indicates that Congress intended to apply NSR to changes that increase actual emissions, instead of potential or allowable emissions.") and *id.* at 61098 (Fourth Circuit ruled CAA "mandated that the PSD definition of 'modification' be identical to the NSPS definition of 'modification' * * * * [and that] for purposes of the PSD program, emissions increases must be determined by comparing the pre- and post-change maximum hourly emissions.").

Rather than trying to refute our demonstration (Pet. 8, 22, 25-26), or recanting its own portrayal of *New York* and the decision below as establishing diametrically opposed statutorily-required "mandates" on how to measure emissions increases, the United States now deems it the better part of valor to *omit all mention* of that conflict. But its silence should not obscure the enormous significance of the conflicting judicial mandates on how EPA is to measure emissions increases: the choice between them determines whether PSD applies to projects that increase actual emissions by thousands of tons per year (the actual annual test), or exempts them (the maximum hourly rate test). See *New York I*, 413 F.3d at 15 (discussing *Puerto Rican Cement*, 889 F.2d at 293, 296-99); Pet. 9-10, 26-27; Pet App. 88a-89a (stipulation that Duke's Plant Modernization Program would not cause emissions increase under maximum hourly rate test); U.S. Opp 3 & n.1. Because the conflicting D.C. Circuit and Fourth Circuit tests are based upon the respective courts' understanding of the Act's unambiguous commands, EPA lacks discretion, whatever its "belief," to depart from either based on policy concerns. See *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 125 S. Ct. 2688, 2700 (2005) (agencies' discretion to re-interpret statute limited when prior court decision "holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion").

4. EPA's "belief" in its ability to handle "any difficulties" by rulemaking, U.S. Opp. at 9, further emphasizes why this Court's review is warranted. In both this case and in *New York I*, EPA pleaded for discretion to define emissions "increases"; but both courts rejected that plea and endorsed directly opposite tests based on unambiguous statutory language. That even EPA cannot square the circle perhaps explains the United States' choice to ignore the conflicting judicial mandates on actual versus potential emissions, but it also defeats any argument for administrative cure.

Logic prevents EPA's proposal from *complying* with both

the Fourth Circuit's and D.C. Circuit's readings of the Act, but EPA's proposal manages to *violate* both. First, EPA's proposal would manifestly fail the Fourth Circuit's textually mandated rule that the NSR and NSPS tests for emissions increases must – because of the shared statutory definitions – be "identical" and "the same." See 70 Fed. Reg. at 61081 (noting that "there are differences in the two programs that prevent a wholesale adoption of the NSPS modification definition into the major NSR provisions" – the very rationale that the Fourth Circuit rejected here, App. 16a-17a). Second, and more significantly given the D.C. Circuit's place under Section 307, EPA's proposal to transplant a slightly altered version of NSPS "maximum hourly rate" standard into PSD is directly inconsistent with the D.C. Circuit's repeated insistence that the Act demands a test based on "actual emissions instead of potential or allowable emissions." *New York I*, 413 F.3d at 40. If EPA wanted to challenge the D.C. Circuit's construction of the Act, it needed to petition for certiorari in *New York I* (which it did not).

Because the Fourth and D.C. Circuits' decisions are both "*Chevron 1*" rulings, EPA has no discretion to depart from either based on policy considerations, such as EPA's newfound distaste for the PSD program (70 Fed. Reg. at 61093-95) as administered "to date," *id.* at 61089, *i.e.*, for more than a generation. The United States' unsuccessful petition for rehearing en banc in *New York I* recognized just this point, urging that the D.C. Circuit "Panel's holding that the statute allows only tests based on actual emissions thus restricts EPA's ability to further reform the NSR program." See U.S. En Banc Pet., No 02-1387 at 2. However eager for "reform" an agency may be, unambiguous congressional intent (as determined by federal courts exercising lawful jurisdiction) remains a constraint. See *New York II*, 2006 WL 662746, *4 (invalidating as contrary to CAA's text, and as based on "Humpty Dumpty" approach to statutory construction, EPA proposal that would have substantially narrowed scope of PSD/NSR program).

EPA's inchoate proposal to establish a maximum hourly rate test "consistent with the Fourth Circuit's holding in *Duke Energy*," 70 Fed. Reg. at 61083, must also be viewed in light of the agency's strenuous arguments below and elsewhere that such a test would eviscerate the effectiveness of the PSD program by exempting projects that increase pollutants by hundreds of tons per year. *E.g.*, EPA Opening Br. in No. 04-1763 at 45; Reh. Pet. at 14. Courts bound to vindicate the enacted will of Congress, see *New York I*, 314 F.3d at 39-40, should not lightly step aside when an agency rushes to embrace what it acknowledges as an incorrect, ultra vires judicial decision that weakens a statutory program.

There are further reasons why the prudential case for "leaving it to the agency" must be at its absolute nadir here. Even where EPA has not been confronted with directly conflicting appellate holdings, proposed rulemakings often languish,[6] and its history of rulemaking in this specific area is particularly unpromising: Long-considered, then dropped, EPA proposals delayed review of the 1980 rules for more than two decades, see *New York I*, 413 F.3d at 14-15, and the last NSR emissions test change took many years. See 61 Fed. Reg. 38,249 (July 23, 1996); 67 Fed. Reg. 80,186 (Dec. 31, 2002). EPA's 2005 Notice is notably undefined, since it contains no actual regulatory language, and would be limited in scope: (1) it would cover Electric Generating Units only, leaving unaffected the larger class of industrial and other non-EGU sources subject to PSD, and (2) would not affect enforcement proceedings (see Pet. 29 n.15) underway or to be

[6] Compare, *e.g.*, 62 Fed. Reg. 66182 (Dec. 17, 1997) (proposing pretreatment standards for control of certain wastewater pollutants), with 62 Fed. Reg. 66182 (Aug. 18, 1999) (withdrawing proposed rule); 55 Fed. Reg. 30798 (July 27, 1990) (proposing regulations on RCRA corrective action), with 64 FR 54604, 54604 (Oct. 7, 1999) (withdrawing "most provisions" of the 1990 proposal); 52 Fed. Reg. 31162 (Aug. 19, 1987) (EPA's proposing on-board refueling vapor recovery systems); with 57 Fed. Reg. 13220 (April 15, 1992) (final decision not to impose ORVR), *vacated by NRDC v. EPA*, 983 F.2d 259 (D.C. Cir. 1993).

filed under the 1980, 1992 and 2002 rules – *all* of which use an actual emissions PSD test that violates the Fourth Circuit's construction of the statute, see U.S. Opp. 3 n.1, 7 n.3.[7]

5. Indeed, it is outright false to say (U.S. Opp. 7) that the Fourth Circuit's ruling is "of no continuing importance" because it affects only the 1980 regulations. The court's construction of the Act also invalidates the emissions increase test the 1992 PSD regulations, which applied to some of Duke's activities. See U.S. Opp. 3 n.1. And the latest PSD regulations, enacted in 2002, share the precise feature (an actual, annual test for emissions increases that is *not* identical to NSPS) that the Fourth Circuit held contrary to the Act's plain language. Compare *New York I*, 413 F.3d at 19-20 (upholding 1980 *and 2002* regulations against argument that EPA violated the Act by using the actual test for PSD, rather than the potential test used under NSPS). See U.S Opp. at 3 n.1, 4. Because it impugns the 2002 regulations governing current operations and planning, the ruling below is causing widespread confusion concerning the present and future obligations of sources within and outside the Fourth Circuit, and stands as a continuing invitation for collateral attacks on those national, D.C. Circuit-validated rules.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[7] The states and citizens downwind from the old coal-burning plants involved in these cases, involving millions of tons of pollutants and massive federal and state enforcement resources, have strong interests in ensuring these actions are not undermined by a reading of the CAA the United States recognizes is entirely wrong. See State Amicus Br. 3.

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IN THE

Supreme Court of the United States

ENVIRONMENTAL DEFENSE, ET AL.,
Petitioners,
v.
DUKE ENERGY, ET AL,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF *AMICI CURIAE* NATIONAL PARKS CONSERVATION ASSOCIATION AND OUR CHILDREN'S EARTH FOUNDATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The National Parks Conservation Association ("NPCA") is a nonprofit citizen organization whose purpose is to protect and enhance the natural and cultural resources of America's National Park System as well as forests, wilderness, and open space areas through research, public education, advocacy, and litigation. NPCA was founded in 1919 and today has over 450,000 members nationwide. NPCA, with its members, is active in protecting air quality in natural areas of interest.

As part of its activities, NPCA is a plaintiff in two Clean Air Act citizen suits against the Tennessee Valley Authority alleging the same type of violations at issue in this case. *Nat'l Parks v. TVA*, Case No. 05-6329 (6th Cir.) (pending) and *National Parks Conservation v. TVA*, No. 06-10729-J (11th Cir.) (pending). NPCA contends that these alleged violations (from TVA plants located in Alabama and Tennessee) cause hundreds of tons of needless pollution annually and are having a significant adverse impact on protected federal lands, including Great Smoky Mountains National Park.

Our Children's Earth Foundation ("OCE"), a non-profit membership organization, is dedicated to protecting the public, especially children, from the health impacts of pollution and other environmental hazards and to improving environmental quality for the public benefit. OCE has members in Tennessee, and to protect the interests of its members, particularly from the impact of TVA's alleged excessive emissions of sulfur dioxide

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief either in whole or in part. No persons other than amici curiae or their counsel made any monetary contributions to its preparation or submission. Both Petitioner and Respondent consented to this filing; their letters of consent are being submitted with the brief.

(a precursor to fine particle pollution),[2] OCE has joined NPCA as a plaintiff in the Clean Air Act citizen suit in Tennessee. *Nat'l Parks v. TVA*, Case No. 05-6329 (6th Cir.) (currently pending).

SUMMARY OF ARGUMENT

The Fourth Circuit's decision in this case did precisely what the Clean Air Act's enforcement scheme was designed to prevent: permit a facial challenge to a regulation in the context of an enforcement action. 42 U.S.C. § 7607(b)(2). This brief in support of the petition focuses on the plain language of the applicable regulations themselves and shows the Fourth Circuit's decision does not comport with that language. Accordingly, this analysis shows that the Fourth Circuit failed to analyze the regulatory text at all, but based its holding instead on a theory that the regulations are inconsistent with the statute. This invalidation of the regulations was proper only in the D.C. Circuit, and that circuit has upheld the regulations. Allowing this type of collateral attack on a validly promulgated regulation would undermine the enforcement scheme created by Congress for the Clean Air Act and many other environmental statutes. Furthermore, given the serious air pollution problems in national parks caused by power plants, and the number of those plants that have allegedly violated the regulations at issue here, this case is of compelling national interest.

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[2] *See* (Proposed) Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Interstate Air Quality Rule), 69 Fed. Reg. 4566, 4572 (Jan. 30, 2004)("Mass associated with ammonium sulfate concentrations make up a significant portion (25 to 50 percent) of the annual average $PM_{2.5}$ mass. The largest sulfate contributions to $PM_{2.5}$ mass occur during the summer season mainly within a large multi-State area centered near Tennessee and Southwest Virginia.").

ARGUMENT

A. THE UNDERLYING ISSUE IN THE CASE.

Under the Clean Air Act's Prevention of Significant Deterioration program ("PSD"), 42 U.S.C. §§ 7470-79, if an owner of a major stationary source makes a "major modification," then it becomes subject to emission limits known as "Best Available Control Technology" ("BACT"). 40 C.F.R §§ 51.166 § (i) and (j). In this case, the plaintiffs alleged that Duke Energy had undertaken 29 projects at eight coal-fired power plants between 1988 and 2000, and each of these projects met the definition of "major modification." Pet. App. 25a-26a. Because these projects were "major modifications," Duke Energy should have obtained stringent BACT emission limits for them, but it never did. The plaintiffs seek an order requiring Duke Energy to obtain the emission limits and operate under them, potentially leading to reductions in hundreds of thousands of tons in sulfur dioxide and nitrogen oxide emissions.

In order to have a "major modification" for the purposes of the PSD program, there must be: (1) a physical change in or change in the method of operation at a major stationary source that would (2) result in a significant net emissions increase. 40 C.F.R. § 51.166(b)(2). The Fourth Circuit's opinion focused on this second element. The plaintiffs contended that in order to have a modification, there must be an increase in ***annual*** actual emissions. Pet. App. 6a-7a. The defendant utility contended that there must be an increase in the ***hourly*** rate of emissions. Pet. App. 6a-7a. Which test applies has practical real world consequences.

The measure of a power plant's ability to generate power in a particular hour is known as its "capacity." Pet. App. 67a.

A power plant, as it ages, may be able to maintain its maximum capacity when it is operating, but it may not be available to generate power around the clock, particularly because malfunctions, or "forced outages," cause unplanned shutdowns. *United States v. Ohio Edison Company*, 276 F. Supp. 2d 829, 838 (S.D. Ohio 2003). Accordingly, a power company can undertake massive overhauls that eliminate forced outages, significantly improving a plant's availability, on an ***annual*** basis, yet leave its "capacity" to generate power in any particular ***hour*** when it is operating, unchanged. In this case, Duke Energy argued that its projects did not trigger the PSD regulations because the projects did not increase the facilities' hourly capacity. Pet. App. 7a. Thus, if the applicable regulations are interpreted to require an increase in ***annual*** actual emissions, the projects, assuming they are found to be non-routine, triggered the PSD regulations, but if the regulations are interpreted to require an increase in the ***hourly*** rate of emissions, they did not.

B. THE FOURTH CIRCUIT'S INTERPRETATION CANNOT BE SUPPORTED BY THE LANGUAGE OF THE REGULATIONS.

In this case, the Fourth Circuit, under the guise of "interpreting" the applicable regulations, held that in order to have a "major modification," a project must lead to an increase in the hourly rate of emissions, not just an increase in annual actual emissions. Pet. App. 6a-7a. The language of the applicable regulations cannot support the Fourth Circuit's interpretation, however. Accordingly, the only way the Fourth Circuit could have achieved its holding was by invalidating the regulation, something it had no jurisdiction to do. 42 U.S.C. 7607(b)(2). This brief, offered in support of the Petition, closely examines the applicable regulations to show that they cannot support the Fourth Circuit's result.

In 1980, EPA issued regulations providing guidance to States on how to structure PSD programs in their State Implementation Plans ("SIPs"). 45 Fed. Reg. 52676 (Aug. 7, 1980). (EPA recodified these regulations into 40 C.F.R. § 51.166 in 1987). The states of North Carolina and South Carolina incorporated these federal regulations into their SIPs in 1982. *See* 47 Fed. Reg. 7836, 7837 (Feb. 23, 1982) (North Carolina) and 47 Fed. Reg. 6017 (Feb. 10, 1982) (South Carolina). Thus it is the language of 40 C.F.R. § 51.166 that must be the focus in this case.

The regulations define "major modification," subject to key exceptions discussed below, as:

> [A]ny physical change in or change in the method of operation of a major stationary source that would result in a significant ***net emissions increase*** of any pollutant subject to regulation under the Act.

40 C.F.R § 51.166(b)(2)(I) (emphasis added). Pet. App. 103a.

"Net emissions increase" is defined as follows:

> [T]he amount by which the sum of the following exceeds zero: (a) [a]ny increase in ***actual emissions*** from a ***particular physical change or change in the method of operation*** at a stationary source; and (b) [a]ny other increases and decreases in ***actual emissions*** at the source that are contemporaneous with the ***particular change*** and are otherwise creditable.

40 C.F.R § 51.166(b)(3)(i)(emphasis added). Pet. App. 104a.

The key analysis under this definition is whether the particular "change" will lead to an increase in "actual

emissions." This term "actual emissions" has a lengthy definition:

> (i) "Actual emissions" means the actual rate of emissions of a pollutant from an emissions unit, as determined in accordance with paragraphs (b)(21)(ii)- (b)(21)(iv) of this section.
>
> (ii) In general, actual emissions as of a particular date shall equal the average rate, ***in tons per year***, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is ***representative of normal source operation***. The reviewing authority may allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.
>
> (iii) The reviewing authority may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.
>
> (iv) ***For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.***

40 C.F.R § 51.166(b)(21) (emphasis added).

Given this language, to determine whether an increase in "actual emissions" will occur, one generally looks to the facility's annual emissions for the two years preceding the project, 40 C.F.R § 51.166(b)(21)(ii), and compares them to the facility's emissions after the project. This analysis, of course,

must occur before a project is undertaken, and so EPA, in promulgating the regulation, had to develop some methodology for estimating what actual emissions would be after the project. EPA exercised its discretion and chose to define "actual emissions" for a facility that had not begun "normal operations" to be the facility's "potential to emit"[3] after the project. 40 C.F.R § 51.166(b)(21)(iv). The D.C. Circuit upheld EPA's decision to interpret the emissions increase test in this way in *New York v. Environmental Protection Agency*, 413 F.3d 3, 18 (D.C. Cir. 2005).

This test is commonly known as the "actual to potential" test, Pet. App. 57a, and it sweeps many sources into the PSD program because of its inherent assumption that sources, after making a modification, will operate "24 hours per day, 365 days per year." *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901, 916 (7th Cir. 1990). The Seventh Circuit, however, rejected the application of this test, holding that if a power plant is engaged in a "like-kind replacement," then EPA cannot properly say that the source making the modification has not commenced normal operations. *Id.* (interpreting 40 C.F.R § 51.166(b)(21)(iv)).

After the Seventh Circuit's 1990 ruling, EPA created a special emissions increase test exclusively for power plants that allows a plant owner to determine whether emission increases

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[3] The regulations define "potential to emit" as: "the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source." 40 C.F.R § 51.166(b)(4).

will occur by comparing actual emissions prior to the change with its projection of what annual emissions will be after the change, but only if it reports to EPA on its post-project emissions. 57 Fed. Reg. 32314, 32335 (July 21, 1992)(adding 40 C.F.R § 51.166(b)(21)(v)). This special test, (the "actual-to-projected-actual test") has no application in this case because at the time most of the projects occurred, the rule change was not incorporated into the North Carolina and South Carolina SIPs. Furthermore, Duke Energy never reported on its post-project emissions, so it could not benefit from the rule's provisions in any event.

Whether the "actual emissions" definition, 40 C.F.R § 51.166(b)(21), is interpreted as imposing an "actual-to-potential" test, or an "actual-to-future-actual" test is, for the purposes of this case, irrelevant.[4] Both tests compare annual emissions before and after a project; the regulatory language does not support an interpretation yielding an hourly emissions test. *See* 40 C.F.R § 51.166(b)(21)(ii)("[A]ctual emissions . . . shall equal the average rate, in ***tons per year***, at which the unit actually emitted the pollutant . . . .").

The Fourth Circuit, as mentioned above, never discussed the actual language of the regulations, but the district court did, finding that an exception contained within the definition of "major modification," 40 C.F.R § 51.166(b)(2)(iii)(f), (the "increased hours" exclusion) imposes, despite the language set forth above, the hourly emissions test. Pet. App. 72a. The language focused upon by the district court is as follows:

> (2)(i)"Major modification" means any physical change in or change in the method of operation of a major stationary

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[4] EPA was prepared to proceed in the case using the actual-to-projected-actual test. Pet. App. 58a, n. 17.

source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.

(ii) Any net emissions increase that is significant for volatile organic compounds shall be considered significant for ozone.

(iii) A physical change or change in the method of operation shall not include:

(a) Routine maintenance, repair, and replacement;

(b) Use of an alternative fuel or raw material by reason of any order under sections 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plan pursuant to the Federal Power Act;

(c) Use of an alternative fuel by reason of an order or rule under section 125 of the Act;

(d) Use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(e) Use of an alternative fuel or raw material by a stationary source . . . ;

(f) ***An increase in the hours of operation or in the production rate***, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations

> approved pursuant to 40 CFR Subpart I or 40 CFR 51.166.
>
> . . .

40 C.F.R § 51.166(b)(2)(emphasis added). The district court ruled that the "increased hours" exclusion required "that in calculating post-project emissions, the EPA must hold the pre-project and post-project hours and conditions of operation constant." Pet. App. 72a.

The district court's analysis was incorrect. As mentioned above, the "modification" test has two elements. First, a source must determine whether a physical or operational change will occur. 40 C.F.R. 51.166(b)(2)(i). Second, if so, the source must determine whether that change will result in a significant net emissions increase. *Id.* By its explicit terms, the "increased hours" exclusion applies at the first step of the analysis, not the second step. Furthermore, the definition of "net emissions increase," 40 C.F.R. § 51.166(b)(3)(i), analyzes whether "a particular physical change or change in the method of operation" at a source has increased emissions. A project that falls within the "increased hours" exclusion could never qualify as the type of "change" that subsection (b)(3)(i) addresses. To put it another way, if the "increased hours exclusion" applies to a project, it would be unnecessary to go on and conduct the "emissions increase" analysis because the activity in question would have already been found exempt.

Thus the plain language of the regulations does not support a conclusion that the "increased hours" exclusion affects the calculation of a "net emissions increase." As the court said in *United States v. Cinergy Corp.*, 384 F. Supp. 2d 1272, 1278 (S.D. Ind. 2005): "the plain meaning of the increased hours exclusion is that an increase in hours or production rate are not a 'physical change' and thus cannot, alone, be a modification.

Increased hours and production rate are not excluded from the definition of 'modification'; that is, if a physical change results in an increase in hours of operation that causes a net emissions increase, a modification has occurred."[5]

Accordingly, what the Fourth Circuit should have done in this case is determine, by carefully reading the regulations, whether the district court's interpretation of the regulations was correct. Instead, the Fourth Circuit failed to "interpret" the regulations at all. Instead, it examined whether the regulations comported with its view of what the statute required, and that type of review was reserved by Congress for the D.C. Circuit, which upheld the regulations in the *New York* case, 413 F.3d 3.

C. ALLOWING A COLLATERAL ATTACK OF AN ENVIRONMENTAL REGULATION IN THE CONTEXT OF AN ENFORCEMENT ACTION WOULD UNDERMINE THE ENFORCEMENT SCHEME OF MANY ENVIRONMENTAL STATUTES.

Allowing the type of collateral attack on the regulations that occurred in this case would not only undermine the Clean Air Act's enforcement scheme, but similar restrictions on judicial review established by Congress in many other environmental statutes. Examples abound:

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[5] Indeed, if the hours-of-operation exclusion were interpreted to include increases in hours of operation that resulted from actual physical modifications, it would lead to the following anomalous result: if a project made physical changes to a source that increased the source's capacity to produce in any particular hour, but did not increase the source's availability to operate more hours, then that project would trigger PSD, but if the project increased ***both*** capacity and availability, it would not.

- ***Clean Air Act***. 42 U.S.C. § 7607(b)(1) provides in pertinent part (emphasis added) that:

> ***A petition for review of action of the Administrator in promulgating*** any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, ***or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. . . .***

42 U.S.C. § 7607(b)(2) provides in pertinent part that:

> Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. . . .

Applying these provisions, the Third Circuit, in the context of a criminal proceeding for violations of asbestos removal work practice standards, refused to entertain an argument that the regulation was invalid. *See United States v. Ho*, 311 F 3d 589, 607 (5th Cir. 2002), *cert. denied* 539 U.S. 914, 123 S. Ct. 2274 (2003). *See also Getty Oil Co. (Eastern Operations), Inc. v. Ruckelshaus*, 467 F.2d 349,

359 (3rd Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) ("Failure to utilize the section 307 proceeding forecloses review in a civil or criminal proceeding for enforcement."); *Commonwealth of Virginia v. United States*, 74 F.3d 517, 525 (4th Cir. 1996)("Because Congress wanted prompt and conclusive review in air quality controversies, it channeled (to the courts of appeals) all challenges, regardless of their basis, of EPA rules and final actions."); *Madison Gas & Electric v. U.S. E.P.A.*, 4 F.3d 529 (7th Cir. 1993) (Challenge to national feature of acid rain program, such as tradability of emission allowances, may be brought only in Court of Appeals for the District of Columbia Circuit, even if impact of program varied greatly across the country).

- ***Clean Water Act.*** 33 U.S.C. § 1369(b)(2); *see Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992)("Reviewability under section 1369 carries a peculiar sting. . . . If an EPA action is reviewable under section 1369(b)(1), then it "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. § 1369(b)(2)."); *see also American Paper Inst., Inc. v. EPA*, 882 F.2d 287, 288-89 (7th Cir. 1989)("the Clean Water Act bars review in enforcement proceedings of actions that could have been reviewed earlier"); *Natural Resources Defense Council, Inc. v. Outboard Marine Corp.* 702 F. Supp. 690, 693 (N.D. Ill. 1988)("Section 1369(b)(1)(F) permits review of an EPA action issuing or denying a permit only in the Circuit Court of Appeals. Section 1369(b)(2) then expressly bars review of an EPA-issued or EPA-denied permit in any District Court enforcement proceeding.");

- ***Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")***, 42 U.S.C. § 9613(a); *see U.S. Ecology, Inc. v. Carlson*, 638 F. Supp. 513, 518-19

(C.D. Ill. 1986)(challenge to a listing on the National Priorities List can only be brought in the D.C. Circuit);

- ***Toxic Substances Control Act ("TSCA")***, 15 U.S.C. § 2618(a); *see Dow Chemical Co. v. Costle*, 484 F. Supp. 101, 104 (D. Del. 1980)(court ruled it had no jurisdiction because, although chemical company claimed it was challenging interpretation and application of regulation imposing a ban on manufacture, it was in fact challenging validity of regulation itself);

- ***Resource Conservation and Recovery Act ("RCRA")***, 42 U.S.C. § 6976(a)(2);

- ***Safe Drinking Water Act***, 42 U.S.C. § 300j-7(a).

In statute after statute, Congress has consistently established a sensible system for judicial review. Challenges to regulations must be brought in the D.C. Circuit, and usually within 90 days of promulgation. Enforcement actions are not to be hindered by such challenges. The Fourth Circuit's decision upsets this carefully crafted system for the administration of justice.

D. THE OUTCOME IN THIS CASE COULD HAVE BROAD IMPLICATIONS ON THE AIR QUALITY IN THE NATION'S NATIONAL PARKS.

The nation's national parks are threatened by air pollution. A report issued by the amici NPCA and OCE, along with another organization, Appalachian Voices, details the damage being caused throughout the park system by air pollution focusing on Great Smoky Mountains National Park, Shenandoah National Park, Mammoth Cave National Park, Sequoia and Kings Canyon National Parks, and Acadia

National Park. *See* National Parks Conservation Ass'n, et. al, "Code Red: America's Five Most Polluted National Parks" (September 2002).[6] This report focuses on three types of impact: haze, ground level ozone, and acid precipitation. *Id.* at 1.

The nation's parks are suffering these injuries even though Congress sought to remedy the air pollution problem in parks almost 30 years ago with the Clean Air Act Amendments of 1977. Pub. L. 95-95, 91 Stat. 685 (1977). This Act granted special protections to National Parks. *See* 42 U.S.C. § 7472 (designating national parks over 6000 acres in size as Class I areas) and 42 U.S.C. § 7475(d) (requiring additional measures to insure that new and modified sources seeking permits under the PSD program do not adversely impact Class I areas). deed, the Act contains an entire program dedicated to proving and protecting visibility in Class I areas. 42 U.S.C. §§ 7491-92.

Twenty-nine years ago, Congress stated: "[the] visibility problem is caused primarily by emission into the atmosphere of sulfur dioxide, oxides of nitrogen and particulate matter, especially fine particulate matter, from inadequate[ly] controlled sources." H.R. Rep. 294, 95th Cong. (1977), at 204, 1977 U.S.C.C.A.N. 1077, 1283 (1977). According to the National Research Council, emissions of sulfur oxides from electric utilities "alone are responsible for slightly more than one-half of anthropogenic light extinction. This is because sulfates are the predominant component of anthropogenic haze in the East and electric utilities are the predominant emitter of

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[6] Available at: http://www.npca.org/across_the_nation/visitor_experience/code_red/codered.pdf (last visited March 5, 2005).

SO_2 (sulfur dioxide) in the East. National Research Council, "Protecting Visibility in National Parks and Wilderness Areas" (1993), at 216.

Although EPA has recently developed two rulemakings to curb park-harming emissions from power plants, the Regional Haze Rule, 64 Fed. Reg. 35714, (July 1, 1999) and 70 Fed. Reg. 39104 (Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations), and the Clean Air Interstate Rule ("CAIR"), 70 Fed. Reg. 25162 (May 12, 2005), those rules do not supersede the New Source Review rules, and they do not take effect until 2015. *See* 70 Fed. Reg. 39145 (2005).

As Congress debated the 1977 Amendments to the Clean Air Act, it believed that old, uncontrolled plants were being phased out:

> There are in the United States approximately 200 old coal-fired power plants over 20 years of age. These plants are moving into the second half of their useful service life. They are operating at reduced capacity factors--some are used on cyclical or peaking loads only and most operate at less than 50 percent of their stated capacity. They are typically among the most expensive units to operate on a system. Most will be totally phased out of operation in the next 5 to 20 years.

S. Rep. No. 127, 95th Cong. (1977), at 128 (Statement of Senator Baker). Thus, as the D.C. Circuit noted in 1980:

> Implementation of the statute's definition of "modification" will undoubtedly prove inconvenient and costly to affected industries; but the clear language of the statute unavoidably imposes these costs except for *de*

> *minimis* increases. The statutory scheme intends to "grandfather" existing industries; but the provisions concerning modifications indicate that this is not to constitute a perpetual immunity from all standards under the PSD program. If these plants increase pollution, they will generally need a permit. Exceptions to this rule will occur when the increases are de minimis, and when the increases are offset by contemporaneous decreases of pollutants. . . ."

Alabama Power Co. v. Costle, 636 F.2d 323, 400 (D.C. Cir. 1980); *see also Ohio Edison*, 276 F. Supp. 2d at 850 ("Congress chose to 'grandfather' existing pollution sources from the NSPS and NSR provisions at the time the statute was enacted. . . . Congress did not, however, intend that such existing sources be forever spared the burden and expense of installing pollution control devices.").

This case and others filed by the Department of Justice and citizens seek to bring into compliance sources that have attempted to evade New Source Review requirements on a massive scale. In 1999, along with this case, the Department of Justice filed actions against six other utility companies covering 17 power plants. U.S. Department of Justice, U.S. EPA, "U.S. Sues Electric Utilities in Unprecedented Action to Enforce the Clean Air Act," press release, November 3, 1999.[7] At that time, EPA issued administrative orders and notices of violation covering an additional 15 plants. *Id.* EPA and the Department of Justice estimated that the failure of the identified utilities to comply with the New Source Review regulations had "resulted in tens of millions of tons of sulfur dioxide, nitrogen oxides, and particulate matter illegally emitted into the air." *Id.*

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[7] Available at: http://www.usdoj.gov/opa/pr/1999/November/524enr.htm (last visited March 5, 2006).

Given the seriousness of the air pollution problems in the national parks caused by power plants and other industrial sources, and given the allegations by EPA and the Department of Justice of violations of the New Source Review Regulations by the utility sector, amici urge the Court to grant review of the Fourth Circuit's decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE

Supreme Court of the United States

ENVIRONMENTAL DEFENSE, NORTH CAROLINA SIERRA CLUB, and NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP CITIZEN LOBBY/EDUCATION FUND,

Petitioners,

v.

DUKE ENERGY CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, DELAWARE, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, NEW HAMPSHIRE, NEW JERSEY, OKLAHOMA, AND VERMONT, THE DISTRICT OF COLUMBIA, AND THE COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION AS AMICI CURIAE IN SUPPORT OF THE PETITION

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INTEREST OF THE *AMICI CURIAE**

This case presents two critical and related issues. The first is whether the Fourth Circuit erred in ruling, contrary to the decisions of this Court and the District of Columbia Circuit, that the United States Environmental Protection Agency ("EPA") lacked authority to interpret the term "modification" in section 111(a)(4) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7411(a)(4), differently under the regulations governing its New Source Performance Standard ("NSPS") and Prevention of Significant Deterioration ("PSD") programs in light of the different purposes of the two programs.[1] The second is whether the Fourth Circuit intruded upon the exclusive jurisdiction of the D.C. Circuit under CAA § 307(b), 42 U.S.C. § 7607(b), by using a CAA enforcement action to review the substantive validity of EPA's nationally-applicable CAA regulations, 25 years after those regulations were promulgated.

Because the States have primary responsibility for administering and enforcing the CAA's regulatory programs, *see Alaska Dept. of Env. Conservation v. EPA*, 540 U.S. 461,

* All parties have consented to the Commonwealth of Pennsylvania Department of Environmental Protection appearing as *amici* on this brief and their consents are being filed herewith. This brief was not authored in whole or in part by counsel for any party. No person or entity other than the *amici* have made a monetary contribution to the preparation or submission of this brief.

1. The PSD provisions of the CAA, 42 U.S.C. §§ 7470-92, cover areas that have already attained the National Ambient Air Quality Standards ("NAAQS"). Although only the PSD requirements are at issue in this case, the Fourth Circuit's decision also applies to areas that have not yet attained the NAAQS, subject to the Nonattainment New Source Review ("NNSR") provisions of the CAA, 42 U.S.C. § 7501-15. The PSD and NNSR programs are together referred to as the New Source Review ("NSR") Program. The acronyms PSD and NSR are used interchangeably throughout this brief.

470, 490 (2004), the decision below uniquely affects the interests of *amici* States in four different ways. First, amici States have an interest in ensuring that the CAA's programs are used, as Congress intended, in a manner that produces and maintains clean air. As this Court has recognized, the PSD program is one of the States' most important tools for reducing air pollution from both in-state and out-of-state sources. *Alaska Dept. Of Env. Conservation*, 540 at 486 (purpose of PSD program "to prevent significant deterioration of air quality in clean-air areas within a State and in neighboring States").

The decision below works a profound change in this area. In the Fourth Circuit and wherever else the decision is applied, sources of pollution will be able to undertake physical changes that increase actual annual emissions without any scrutiny. A plant whose modification enables it to operate more hours may well substantially increase its total annual emissions, even if the modification does not increase its hourly emission rate.[2]

2. The D.C. Circuit, using the facts in *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292 (1st Cir. 1989), has aptly illustrated this point:

> In that case, a factory sought to . . . replace old cement kilns that operated 60% of the time with a new kiln that would emit fewer pollutants per hour. . . . Under the interpretation urged by industry petitions, [] the company had not undergone an 'increase' in emissions – and thus would not trigger NSR – since the new kiln would have a lower hourly emissions rate than the old ones. Siding with EPA, the First Circuit agreed that the company had to obtain an NSR permit to make the intended change [because of the projected increase in actual annual emissions resulting from the change].

New York v. EPA, 413 F.3d 3, 15 (D.C. Cir. 2005), *reh'g and reh'g en banc denied*, __ F.3d __ (Dec. 9, 2005). Like the kiln replacement in *Puerto Rican Cement*, the rehabilitation projects at issue here were

(Cont'd)

Under the Fourth Circuit's decision, such rehabilitation projects need not comply with the NSR requirements. The resulting emission increases will harm public health. For example, power plant emissions of sulfur dioxide (SO_2) and nitrogen oxides (NO_x), two of the pollutants at issue here, lead to the formation of fine particulate matter (soot) and ground level ozone (smog), which will kill tens of thousands of Americans annually and sicken hundreds of thousands of others. U.S. EPA, Proposed Rule to Implement the Fine Particle Ambient Air Quality Standards, 70 Fed. Reg. 65,984, 66,006 col. 3 (November 1, 2005).

Second, the Fourth Circuit's decision will not only hamper the States' efforts to enforce the PSD requirements by changing the substantive standard within that Circuit, but will also cause delay and confusion elsewhere. For example, several of the *amici* are currently enforcing the PSD regulations against facilities located both within and outside their borders whose pollution harms in-state air quality. *See, e.g., United States v. American Electric Power Serv. Corp.* ("*AEP*"), 137 F. Supp.2d 1060 (S.D. Ohio 2001) (eight states and EPA filed claims concerning eight power plants); *United States v. Cinergy Corp.*, 384 F. Supp.2d 1272 (S.D. Ind. 2005) (three states and EPA filed claims concerning six power plants); *Pennsylvania v. Allegheny Energy Inc.*, 2005 US Dist. LEXIS 28894 (W.D. Pa. 2005) (five states alleging violations at three power plants). Defendants in the *AEP* and *Cinergy*

(Cont'd)

intended to increase the future hours of operation of the plants, *see* Petition at 9, resulting in increased annual emissions without increasing the hourly emission rate. *See United States v. Duke Energy*, 411 F.3d 539, 544 (4th Cir. 2005), *reh'g en banc denied*, __ F.3d __ (Aug. 30, 2005).

cases have sought dismissal of the claims at issue there based on the Fourth Circuit's interpretation of the PSD emissions test. The decision below is therefore already acting as an impediment to the reduction of air pollution within and between the States.

Third, proper application of the CAA's provisions about the timing of judicial review is essential to *amici* States because of their role in administering the Act's programs. The CAA's judicial review provisions, including the 60-day limitations period, 42 U.S.C. § 7607(b), ensure that the courts will have determined the validity of any nationally applicable EPA regulations before the States must adopt regulations to implement them. The Fourth Circuit's decision, however, exposes to judicial review long-standing EPA regulations on which the States have based their clean air programs for decades.

Fourth, predictable and uniform application of the PSD program, which is promoted by the provisions of the CAA that confine review of the validity of EPA regulations to a single court, is likewise important to amici States. The Fourth Circuit's ruling effectively invalidates EPA's 1980 PSD regulations in the Fourth Circuit and exposes States outside that circuit to uncertainty about the regulations' meaning in their own jurisdictions. The decision has already led to forum-shopping, as power plant owners filed an unprecedented preemptive lawsuit in the Northern District of West Virginia, apparently in order to use the decision in the present case to challenge alleged violations at plants located in Pennsylvania. *See Allegheny Energy Supply Co. LLC v. Spitzer*, No. 1:05cv04 (N.D.W.Va.).[3]

3. *Allegheny Energy* was filed after issuance of the district court decision below, which was in turn affirmed by the Fourth Circuit.

SUMMARY OF ARGUMENT

A grant of certiorari is warranted to review the Fourth Circuit's decision. First, its finding that EPA must use the same test to identify emissions increases under both its NSPS and PSD programs conflicts with decisions of other circuit courts and of this Court on matters of great public importance. In particular, the decision below is contrary to *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005), *reh'g and reh'g en banc denied*, __ F.3d __ (Dec. 9, 2005), in which the D.C. Circuit upheld the same PSD emissions increase test. The court rejected the view, adopted by the Fourth Circuit, that EPA must interpret the statutory term "modification" for the PSD regulations as it does the NSPS regulations, such that only a project that increases a plant's hourly rate of emissions constitutes a "modification" subject to state permitting procedures. *Id.* at 19-20, 39-40. The decision below likewise conflicts with *Wisconsin Electric Power Co. v. Reilly* ("*WEPCo*"), 893 F.2d 901 (7th Cir. 1990), and *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292 (1st Cir. 1989), which recognized and gave effect to the differences between the emissions increase methodologies under the NSPS and PSD regulations. The Fourth Circuit's holding that EPA must construe a single CAA term identically in the regulations governing two different programs is also directly contrary to *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984) and *Alabama Power v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), both of which held that EPA has the authority to construe such a term differently in the NSR and NSPS regulations.

Second, the Fourth Circuit's decision violates CAA § 307(b)(2), which gives the D.C. Circuit exclusive authority to rule on the validity of EPA regulations promulgated under the CAA. The court found that the NSPS and PSD regulations

must interpret the statutory term "modification" identically. There is no question, though, that the regulations are not uniform. Whereas the NSPS requirements are triggered only if there is a post-project increase in the hourly rate of emissions from a unit, the PSD requirements are triggered by an increase in a unit's total annual emissions. By requiring that the PSD regulations conform with the NSPS regulations, the Fourth Circuit effectively invalidated those regulations without jurisdiction to do so.

ARGUMENT

I. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AND OF THIS COURT ON A MATTER OF PUBLIC IMPORTANCE.

A. The Fourth Circuit's Decision Conflicts With *New York v. EPA*, In Which the D.C. Circuit Upheld the 1980 PSD Emissions Test Effectively Invalidated by the Court Below.

The Fourth Circuit's decision is directly contrary to the decision of the D.C. Circuit in *New York v. EPA*, issued nine days after the Fourth Circuit ruled.[4] In rejecting a challenge by industry (including Duke) to the PSD modification regulations, the D.C. Circuit likewise rejected industry's argument that "modification must have the same regulatory meaning for NSR as prevailed for NSPS in 1977 [because] Congress, by a cross-reference, used the same language in both statutory contexts." 413 F.3d at 19-20. The D.C. Circuit's

4. Although *New York* was brought to the Fourth Circuit's attention on petition for rehearing, the court refused to modify its ruling.

decision that EPA is *not* required to use the NSPS hourly emission rate test in the PSD regulations cannot be squared with the Fourth Circuit's holding that the NSPS and PSD regulations must have the same test for modifications. This case therefore presents a conflict between the Fourth Circuit's decision and the authoritative decision of the D.C Circuit, which, as explained below, has exclusive power to review the validity of EPA regulations under the CAA. *See infra* Point II.

B. The Fourth Circuit's Decision Conflicts With the Decisions of Several Other Courts That Have Recognized The Differences Between the Emissions Tests under NSPS and PSD.

The Fourth Circuit's decision upholding the district court's interpretation of the PSD emissions test as necessarily identical to the NSPS emissions test also conflicts with decisions of the Seventh and First Circuits, recognizing that the tests can and do differ. In *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990), for example, the Seventh Circuit noted that,

> [t]o determine whether a physical change constitutes a modification for purposes of NSPS, the EPA must determine whether the change increases the facility's *hourly rate* of emission. 40 C.F.R. § 60.14 (1988). For PSD purposes, current EPA regulations provide that an increase in the *total amount* of emissions activates the modification provisions of the regulations. 40 C.F.R. § 52.21(b)(3) (1988).

893 F.2d at 905; *see also id.* at 915 ("unlike NSPS, PSD is concerned with changes in *total annual emissions*, expressed in tons per year"); *Puerto Rican Cement*, 889 F.2d at 296-99 (1980 PSD regulations triggered even if hourly rate of emissions remained the same).

The Fourth Circuit's decision is also contrary to the decisions of two district courts that have relied on *WEPCo* and applied the PSD modification regulations as written, to require an increase in annual, not hourly, emissions as a predicate for application of the PSD permitting requirements. *See United States v. Cinergy Corp.*, 384 F. Supp.2d 1272, 1277 (S.D. Ind. 2005) ("The Court disagrees with . . . the *Duke* court that the EPA's definition of 'actual emissions,' means that 'a net emissions increase can result only from an increase in the hourly rate of emissions.'");[5] *United States v. Ohio Edison Co.*, 276 F. Supp.2d 829, 863-64 (S.D. Ohio 2003) (proposed change must "result in an increase in emissions, also expressed in tons per year," to trigger PSD).

These decisions reflect a reality that the Fourth Circuit chose to ignore: that the divergent purposes of the NSPS and NSR programs strongly suggest that Congress intended the use of different emissions increase tests under the two programs. The NSPS provisions of the CAA are intended to ensure that new and modified sources use emission controls that are at least as effective as the "best system of emissions reduction which . . . has been adequately demonstrated." 42 U.S.C. § 7411(a)(1). This requirement is the same regardless of the quality of air in the area where the plant is located or the number of sources located in the area. In contrast, the NSR provisions are concerned with maintaining (in the case of PSD) and improving (in the case of NNSR) air quality in areas where new or modified plants are located. For example, the PSD provisions require that the effect of a new or modified source on air quality in the region be analyzed, 42 U.S.C. § 7475(a), while the NNSR provisions

5. The Seventh Circuit has granted Cinergy's motion for interlocutory appeal of this decision.

require such a source to obtain emissions offsets so that total emissions will be sufficiently less after the source begins operation, 42 U.S.C. § 7503(a)(1). No similar requirements exist in the NSPS program.

EPA's regulations simply reflect these differences between the two programs. Because the NSPS program is primarily concerned with the efficacy of emission controls, without regard to the total amount of pollution emitted, the NSPS regulations require an increase in the hourly emission rate as a prerequisite for a major modification. *See* 40 C.F.R. § 60.14(b)(NSPS emissions test based on rate of emissions "expressed as kg/hr"). On the other hand, because NSR is concerned with the total amount of pollution being emitted, a modification that increases total annual emissions triggers NSR requirements regardless of whether the hourly emission rate is increased. *See, e.g.*, 40 C.F.R. § 52.21(b)(2)(i), (3)(i), (21)(i) (PSD emissions test based on *actual* amount of emissions increase expressed in terms of *tons per year*); *see generally* 57 Fed. Reg. 32314, 32316 col. 1 (July 21, 1992) (different emission increase tests reflect "the fundamental distinctions between the technology-based provisions of NSPS and the air quality-based provisions of NSR").

C. The Fourth Circuit's Decision is Contrary to *Chevron* and *Alabama Power*, Which Allow EPA to Interpret a Statutorily-Defined CAA Term Differently in the NSPS and NSR Regulations.

The Fourth Circuit's holding that EPA must construe a statutorily-defined term identically in its NSR and NSPS regulations is also contrary to *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 863-64 (1984), and *Alabama Power v. Costle*, 636 F.2d 323 (D.C. Cir. 1979). In *Chevron*, this Court upheld

EPA's authority to interpret a single CAA term differently in its NNSR regulations than it did in its NSPS regulations. At issue was EPA's interpretation of the statutory term "stationary source," under 42 U.S.C. § 7411(a)(3), CAA § 111(a)(3),[6] as it applies to determining whether a physical change at a facility results in an emissions increase that triggers the NNSR modification requirements. EPA interpreted "stationary source" to include all emissions sources located at a single facility and allowing the facility to net (or "bubble") emissions increases and decreases across sources. 467 U.S. at 840. Notably, at the time the NNSR regulations were promulgated, EPA did not allow such netting under the NSPS regulations,[7] in accordance with the D.C. Circuit's decision in *ASARCO, Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978). *See* 45 Fed. Reg. 5617 (Jan. 23, 1980) ("revok[ing] the bubble concept as a means of determining what constitutes a 'modified' source for the purpose of applying new source performance standards").

On petition for review, the D.C. Circuit set aside the NNSR regulations, finding that EPA was required to interpret "stationary source" to preclude netting, as it had done in the NSPS context. 467 F.2d at 841-42 (citing 685 F.2d 718, 726 (D.C. Cir. 1982)). This Court reversed, emphasizing

6. While the CAA § 111(a)(3) definition of "stationary source" is not explicitly cross-referenced in the NNSR provisions, the Court found that "it sheds as much light on the meaning of the word 'source' as anything in the statute." 467 U.S. at 860.

7. As noted above, the NNSR regulations applicable to modifications are in all relevant respects identical to the corresponding PSD regulations at issue here. *Compare* 40 C.F.R. § 52.24(f)(5), (f)(6), (f)(10) and (f)(13) with 40 C.F.R.§ 52.21(b)(2), (b)(3), (b)(21) and (b)(23).

EPA's authority to define a single CAA term differently depending on the regulatory program at issue:

> Our review of the EPA's varying interpretations of the word "source" – both before and after the 1977 Amendments – convinces us that the agency primarily responsible for administering this important legislation has consistently interpreted it flexibly – not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena. . . . Moreover, the fact that the agency has adopted different definitions in different contexts adds force to the argument that the definition itself is flexible, particularly since Congress has never indicated any disapproval of a flexible reading of the statute.

467 U.S. at 863-64. Thus, *Chevron* recognized that the same language supported an emission increase test based on plant-wide emissions for modifications under the NNSR regulations and a dramatically different test prohibiting "netting" under the NSPS regulations. The term at issue here, "modification," is defined in the same section of the CAA (§ 111) as "stationary source" and must be governed by the same interpretive rules.

Furthermore, the Fourth Circuit's decision is contrary to the D.C. Circuit's decision in *Alabama Power*, which upheld the bubble concept adopted by EPA under the PSD regulations. 636 F.2d at 400-02. As in *Chevron*, the D.C. Circuit's analysis of the PSD bubble concept determined "what types of industrial changes will be construed as 'modifications' subject to PSD review requirements." *Id.* at 400. As noted above, the D.C. Circuit had previously

held the "bubble" concept to be unlawful under the NSPS regulations. *ASARCO*, 578 F.2d at 329. In holding that EPA was not only allowed but required to implement the PSD requirements differently from the NSPS requirements, the court concluded that "a bubble concept would be contrary to the intent of the NSPS provisions, but such is clearly not the case with regard to the PSD provisions." *Alabama Power*, 636 F.2d at 402. The court explained that, although the statutory definition of "stationary source" applicable under PSD is the NSPS statutory definition found in CAA § 111(a)(3), *id.* at 395, EPA must interpret that definition differently in implementing regulations under the NSPS and PSD programs due to "differences in the purpose and structure of the two programs." *Id.* at 401-02.[8]

II. THE PETITION SHOULD BE GRANTED TO PROMOTE THE INTERESTS IN CERTAINTY AND UNIFORMITY UNDERLYING CAA SECTION 307(b)(2).

The Fourth Circuit's decision deprives the States and the regulated community of certainty about the applicable PSD requirements, contrary to the purpose of § 307(b)(1). The CAA forecloses any challenges to EPA's PSD regulations – which are "nationally applicable regulations" – except by petition for review filed in the D.C. Circuit within 60 days after promulgation of the regulations. CAA § 307(b)(1).

8. The Fourth Circuit erroneously relied on *Rowan Cos. v. United States*, 452 U.S. 247 (1981), a case construing the provisions of the Tax Code. The *Rowan* decision, however, relied upon the explicit Congressional concern for "the interest of simplicity and ease of administration" of the Tax Code, 452 U.S. at 255, which is inapplicable here because of the different purposes behind the PSD and NSPS programs.

Additionally, if a final EPA action "could have been" challenged in the D.C. Circuit, such an action "shall not be subject to judicial review in civil or criminal proceedings for enforcement." *Id.* at § 307(b)(2). The "twin congressional purposes" in enacting § 307(b) were to "insur[e] that the substantive provisions of the [regulation] would be uniformly applied and interpreted and that the circumstances of its adoption would be quickly reviewed by a single court intimately familiar with administrative procedures." *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284 (1978); *see also United States v. Ethyl Corp.*, 761 F.2d 1153, 1157 (5th Cir. 1985) ("section 307(b)'s clear language and Congress's manifest intent [was] to avoid protracted and inconsistent adjudications over the validity" of nationally applicable EPA regulations), *cert. denied sub nom. Firestone Tire & Rubber Co. v. United States*, 474 U.S. 1070 (1986).

The decision below subverts these purposes and leaves the States unsure of how to fulfill their obligations under federal environmental statutes. States that have relied on the validity of EPA's PSD regulations – including the actual annual emissions increase test for modifications – now face uncertainty about the legality of their state implementation plans ("SIPs"), which incorporate the annual emissions increase test of the PSD regulations. If the Fourth Circuit's decision stands, even after the window for judicial review has closed, the States will no longer be able to rely on the validity of EPA regulations they are required to enforce. The result will be administrative confusion and effort wasted on promulgating state regulations in mistaken reliance on the validity of the federal programs being implemented.

The decision also guarantees, directly contrary to Congressional intent, that federal CAA programs will not be

implemented uniformly across the fifty states. As discussed above (pp. 6-12), the Fourth Circuit's decision conflicts with the decisions of other courts, which have given effect to the differences between the NSPS and PSD emissions tests. Now, though, the PSD requirements applicable in the Fourth Circuit are different from those applicable in the remaining 45 states.

Nor can this disparity be fixed without this Court's intercession. In response to the Fourth Circuit's decision, EPA has proposed to change the PSD emissions test to correspond to the NSPS emissions test in order to cure the serious disparity and confusion created by the Fourth Circuit's decision. *See* 70 Fed. Reg. 61,081, 61,083 col. 2 (Oct. 20, 2005) ("[*Duke*'s] holding creates a potential disparity in the way we interpret the program in the States in the Fourth Circuit compared to States in other Circuits in the country," creating need to "establish a[n emissions] test consistent with the Fourth Circuit's holding"). EPA's decision is structurally unsound, for it effectively supplants the D.C. Circuit's exclusive authority to review the validity of nationwide regulations, instead allowing the Fourth Circuit to dictate the substance of EPA's PSD regulations. Furthermore, even EPA's proposed rule does not satisfy the Fourth Circuit's mandate, for it seeks to maintain certain differences in the NSPS and PSD regulatory definition of "modification" because "[t]here are differences between the two programs." *Id.* at 61,090 col. 2. Thus, not even EPA's proposed rule change will comply with the Fourth Circuit's requirement that the regulatory definitions be identical.

Nor is the mischief created by the decision below confined to the Clean Air Act. Numerous other environmental statutes contain provisions similar to CAA § 307(b), vesting the D.C. Circuit with exclusive authority to review nationwide regulations. *See, e.g.*, 33 U.S.C. § § 2717(a) (Oil Pollution Act);

42 U.S.C. § 300j-7(a)(1) (Safe Drinking Water Act); 42 U.S.C. § 6976(a)(1) (Resource Conservation and Recovery Act); 42 U.S.C. § 9613(a) (Comprehensive Environmental Response, Compensation and Liability Act). The need for uniformity and predictability in the nationwide effort to protect and conserve environmental resources likewise animates these provisions. Unless this Court scrutinizes the Fourth Circuit's arrogation to itself of authority to pass on the validity of environmental regulations, the uniformity and certainty of nationwide requirements applicable under these other environmental laws will also be threatened.

CONCLUSION

For the reasons set forth above and in the petition, the Court should grant certiorari in this case.

Respectfully submitted,

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In The

Supreme Court of the United States

ENVIRONMENTAL DEFENSE, *et al.*,

Petitioners,

v.

DUKE ENERGY CORPORATION, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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RELEVANT DOCKET ENTRIES

U.S. District Court
Middle District of North Carolina (Durham)
CIVIL DOCKET FOR CASE
USA v. Duke Energy Corp.
#: 00-CV-1262

Date Filed	Docket Entry #	Description
12/22/00	1	Complaint filed. (Entry date: 12/28/00)
3/12/01	3	Answer to Complaint and Counterclaim by Duke Energy Corp. (Attorneys DANIEL W. FOUTS, T. THOMAS COTTINGHAM III) against USA; Answer due on 4/1/2001 for USA. (Entered: 03/13/2001)
5/8/01	5	Motion by Environmental Def., NC Sierra Club, NC Public Interest to Intervene as Plaintiffs (Entered: 05/09/2001)
9/6/01	24	MEMORANDUM OPINION on applicants' motion to intervene; applicants have a statutory right to intervene and their motion to intervene will be granted pursuant to Rule 24(a)(1) of the Fed.R.Civ.P.; applicants' participation in the litigation will be coordinated with that of the Plaintiff United States to ensure the efficient adjudication of this case; an order in accordance with this memorandum opinion shall be entered contemporaneously herewith (signed by JUDGE FRANK W. BULLOCK JR.) (EOD Date 9/6/01).

9/6/01	25	ORDER, for the reasons set forth in the memorandum opinion filed contemporaneously herewith, that Applicants Environmental Defense, North Carolina Sierra Club, and North Carolina Public Interest Research Group Citizen Lobby/Education Fund's motion to intervene [Doc. #5] is GRANTED (signed by JUDGE FRANK W. BULLOCK JR.) (EOD Date 9/6/01).
9/6/01	26	Complaint in Intervention (Entered: 09/06/2001)
10/9/01	35	ANSWER to Plaintiffs-Intervenors' Complaint by DUKE ENERGY CORP. (Entered: 10/11/2001)
12/18/02	94	MEMORANDUM OPINION re: the United States' motion for leave to amend the complaint; an order in accordance with this memorandum opinion shall be entered contemporaneously herewith (signed by JUDGE FRANK W. BULLOCK JR.) (EOD Date 12/18/02).
12/18/02	95	ORDER, for the reasons set forth in the memorandum opinion filed contemporaneously herewith, that the motion [Doc. #72] of the United States for leave to file an amended complaint is DENIED * * * (signed by JUDGE FRANK W. BULLOCK JR.) (EOD Date 12/18/02).
1/31/03	128	MOTION for Summary Judgment on all of Plaintiff's and Intervenors' claims that Duke violated the New Source Review provision of the Clean

		Air Act and related States Implementation Plan provision of North and South Carolina by defendant DUKE ENERGY CORP. (Entered: 02/03/2003)
1/31/03	129	Brief, with Appendices in Five (5) Volumes . . . by Duke Energy Corp. in Support of [128-1] Motion for Summary Judgment * * * (Entered: 02/03/2003)
1/31/03	130	MOTION for Partial Summary Judgment on Defendant's Defenses of "Fair Notice" and JOINDER IN MOTION for Partial Summary Judgment by the United States on the applicable legal test for "routine maintenance"; on Defendant's defenses on "routine maintenance", emissions calculations and defendant's "statute of limitations" defenses by intervenor-plaintiffs NC PUBLIC INTEREST, NC SIERRA CLUB, and ENVIRONMENTAL DEF. (Entered: 02/03/2003)
1/31/03	131	Brief, with Exhibits 1-21, by NC Public Interest, NC Sierra Club, Environmental Def. in Support of [130-1] Motion * * * (Entered: 02/03/2003)
1/31/03	132	MOTION for Partial Summary Judgment on the applicable legal test for "routine maintenance," Defendant's defenses of "fair notice" and "routine maintenance", calculation of emissions, and defendant's "statute of limitations" defenses by plaintiff USA (Entered: 02/03/2003)
3/31/03	152	RESPONSE by USA to [128-1] motion for Summary Judgment on all of

		Plaintiff's and Intervenors' claims that Duke violated the New Source Review provision of the Clean Air Act and related States Implementation Plan provision of North and South Carolina by DUKE ENERGY CORP. (Entered: 04/01/2003)
3/31/03	158	RESPONSE BRIEF IN OPPOSITION, with Supplemental Appendix of Exhibits in four (4) Volumes, by DUKE ENERGY CORP. to [132-1] motion for Partial Summary Judgment * * * (Entered: 04/01/2003)
3/31/03	159	BRIEF IN RESPONSE with Exhibits by ENVIRONMENTAL DEF., NC SIERRA CLUB, NC PUBLIC INTEREST to [128-1] motion for Summary Judgment * * * (Entered: 04/01/2003)
3/31/03	160	RESPONSE BRIEF IN OPPOSITION by DUKE ENERGY CORP. to [130-1] motion for Partial Summary Judgment on Defendant's Defenses of "Fair Notice" by Plaintiff-Intervenors, ENVIRONMENTAL DEF., NC SIERRA CLUB, NC PUBLIC INTEREST (Entered: 05/12/2003)
4/25/03	174	AMENDED RESPONSE BRIEF IN OPPOSITION, with attachments, by DUKE ENERGY CORP. to Plaintiff's [132-1] motion for Partial Summary Judgment on the applicable legal test for "routine maintenance," Defendant's defenses of "fair notice" and "routine maintenance", calculation of emissions, and defendant's "statute of limitations" defenses (Entered: 04/28/2003)

4/30/03	185	REPLY by DUKE ENERGY CORP. to Plaintiff-Intervenors' response to [128-1] motion for Summary Judgment * * * (Entered: 05/01/2003)
4/30/03	186	REPLY by DUKE ENERGY CORP. to Plaintiff, USA's response to [128-1] motion for Summary Judgment * * * (Entered: 05/01/2003)
4/30/03	187	SECOND SUPPLEMENTAL APPENDIX OF EXHIBITS in one (1) volume by DUKE ENERGY CORP. in support of [128-1] motion for Summary Judgment * * * (Entered: 05/01/2003)
4/30/03	188	REPLY, with Exhibits 1 & 2, by Plaintiff-Intervenors' NC PUBLIC INTEREST, NC SIERRA CLUB, ENVIRONMENTAL DEF. in support of [130-1] Motion Summary Judgment on Fair Notice (Entered: 05/01/2003)
4/30/03	189	REPLY, with Appendix A and supporting Exhibits 156-165, by USA to response to [132-1] motion for Partial Summary Judgment * * * (Entered: 05/01/2003)
7/18/03		Motion hearing held re: [132-1] motion for Partial Summary Judgment * * * , [130-1] motion for Partial Summary Judgment * * * , [128-1] motion for Summary Judgment * * * held before USDJ Frank W. Bullock, Jr. * * * (Entered: 07/21/2003)
8/13/03	231	TRANSCRIPT of ORAL ARGUMENTS ON MOTIONS FOR SUMMARY JUDGMENT filed, held before

JUDGE FRANK W. BULLOCK, JR. * * * (Entered: 08/14/2003)

8/26/03 234 MEMORANDUM OPINION that, for the reasons set out, the court will grant in part and deny in part the EPA's motion for partial summary judgment in which Intervenor-Plaintiffs join; * * * (signed by JUDGE FRANK W. BULLOCK JR.) (Entered: 08/26/2003)

8/26/03 235 ORDER AND JUDGMENT, for the reasons set forth in the memorandum opinion filed contemporaneously herewith, that Duke Energy's motion for summary judgment [Doc. #128] is DENIED; further ORDERED that the United States' motion for partial summary judgment [Doc. #132] on the applicable legal tests for "routine maintenance" and calculation of emissions, and on Duke Energy's defenses of "fair notice" and "routine maintenance", in which Intervenor-Plaintiffs join [Doc. #130], is DENIED; further ORDERED AND ADJUDGED that the United States' motion for partial summary judgment [Doc. #132] on Duke Energy's defense that the statute of limitations bars the United States' claims arising from activities occurring prior to December 22, 1995, in which Intervenor-Plaintiffs join [Doc. #130], is GRANTED; further ORDERED that Intervenor-Plaintiffs' motion for partial summary judgment [Doc. #130] on Duke Energy's defense of "fair notice" is DENIED; further

		ORDERED that Duke Energy's motion for partial judgment on the pleadings [Doc. #37] is DENIED. Remaining for trial are the issues of whether Duke Energy's projects were routine maintenance, repair, and replacement as defined relative to the industrial category and whether Duke Energy's projects caused an increase in annual net emissions, assuming constant hours and conditions of operation (signed by JUDGE FRANK W. BULLOCK JR.) (Entered: 08/26/2003)
12/23/03	268	MOTION by USA for Reconsideration of [235-1] judgment and [234-1] order or, in the alternative, to certify orders for interlocutory appeal and for stay pending appeal. (Entered: 12/29/2003)
12/29/03	270	Response by NC Public Interest, NC Sierra Club, Environmental Def., to the [268-1] USA's Motion for Reconsideration * * * (Entered: 12/30/2003)
2/23/04	294	ORDER denying [268-1] motion for Reconsideration of [235-1] judgment and [234-1] order or, in the alternative, to certify orders for interlocutory appeal and for stay pending appeal. The court will direct the Clerk to schedule this case for trial during the July term and provide proper notice to the parties; signed by JUDGE FRANK W. BULLOCK JR. (J. Wilson) (Entered: 02/23/2004)

4/13/04	311	STIPULATIONS by all parties in support of Joint Motion for entry of final Judgment, to stay consideration of Rule 72(a) Objections, and to stay enforcement of discovery Order (Entered: 04/13/2004)
4/14/04	313	ORDER AND FINAL JUDGMENT signed by JUDGE FRANK W. BULLOCK JR., that Summary Judgment is granted in favor of Defendant Duke Energy on Plaintiff's and Plaintiff-Intervenors' PSD claims in this action. * * * (Entered: 04/15/2004)
6/10/04	314	NOTICE OF APPEAL to USCA 4th Circuit by NC PUBLIC INTEREST, NC SIERRA CLUB and ENVIRONMENTAL DEFENSE of [313-1] Final Order and Judgment (Entered: 06/14/2004)
6/10/04	315	NOTICE OF APPEAL to USCA 4th Circuit by USA of [313-1] Final Order and Judgment (Entered: 06/14/2004)

US Court of Appeals for the Fourth Circuit
GENERAL DOCKET FOR CASE
United States, et al v. Duke Energy Corp.
No. 04-1763

Date	Description
6/24/04	Civil Case Docketed.
2/3/05	Oral argument heard. Panel: Honorable J.M. Luttig, Honorable Diana G. Motz, Honorable Samuel G. Wilson. [04-1763] (su)
5/2/05	Court Order to file Supplemental Briefs.
6/15/05	Judgment Order filed. Decision: AFFIRMED.
8/1/05	Petition Filed by Appellant Environmental Defense, NC Sierra Club, Appellant NC Public Interest for rehearing/ rehearing en banc
8/1/05	Petition filed by Appellant USA for rehearing * * * and rehearing en banc.
8/30/05	Court Order filed Denying all Motions for Rehearing; Motions for Rehearing *En Banc*
9/7/05	Mandate Issued.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	CIVIL NO. 1:00CV1262
v.	)	
DUKE ENERGY CORPORATION,	)	
Defendant.	)	

ORDER

(Filed Sep. 6, 2001)

BULLOCK, District Judge

For the reasons set forth in the memorandum opinion filed contemporaneously herewith,

IT IS ORDERED that Applicants Environmental Defense, North Carolina Sierra Club, and North Carolina Public Interest Research Group Citizen Lobby/Education Fund's motion to intervene [Doc. #5] is GRANTED.

September 6, 2001

/s/ _____
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	CIVIL NO. 1:00CV1262
v.	)	
DUKE ENERGY CORPORATION,	)	
Defendant.	)	

EXHIBITS IN SUPPORT OF DUKE'S
MOTION FOR SUMMARY JUDGMENT

(Filed Jan. 31, 2003)

* * *

EXHIBIT 9

[LOGO] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 9 1986

THE ADMINISTRATOR

Honorable John D. Dingell
Chairman
Committee on Energy and Commerce
House of Representive
Washington, D.C. 20515

Dear Mr. Chairman:

On April 14, 1986 you requested that I respond to a number of questions regarding H.R. 4567, the "Acid Deposition Control Act of 1986." Given the seriousness of both the proposal and its potential consequences over the next 20 years, I believe deliberate and thorough consideration should be given to your questions and to the impact of this proposed legislation. We also wish to be timely and helpful with respect to the Committee's rapid deliberations on H.R. 4567. Therefore, the enclosure provides preliminary answers to questions 1 through 7, 9, 11 through 23, and 25. We may wish to provide revised answers to these questions after more careful review and analysis. Any revised answers and answers to the remaining questions will be provided as soon as possible.

I should point out that these answers have not yet been reviewed by all Interested Agencies of the Administration and, therefore, can be said to reflect only EPA's assessment.

Sincerely,

/s/ Lee M. Thomas
Lee M. Thomas

76. *Acid Deposition Control Act of 1986 (Part 1): Hearing on H.R. 4567 Before the Subcomm. on Health and the Env't of the House Comm. on Energy and Commerce*, 99th Cong., 439, 446-449 (1986) (material submitted for the record by Environmental Protection Agency, responses to questions submitted by April 14, 1986, letter from John D. Dingell). Hearings Volume XVIII – 4/29/86.

Question 2.a.

According to a March 3, 1986 letter from the Environmental Protection Agency (EPA) to the National Coal Association (NCA), EPA and NCA apparently have differences about forecasts of SO_2 emissions form coal-fired power plants. Please provide a table showing the EPA and NCA projections and the assumptions adopted by both. Please explain how the assumptions may differ and the significance of the of the differences. Please indicate to what extent, if any, the recent reduction in the price of all and other market forces may affect these predictions. We are providing a copy of this enclosure to the Department of Energy (DOE) to comment on the forecasts. Please discuss the implications of these differences to the potential cost and emission reductions achieved by this bill.

Response:

Attachment 2A is an excerpt from a recent report by ICF, Inc. which summarizes the differences between EPA and NCA projections of future SO_2 emissions.

We have not yet performed an analysis using current low oil prices. The environmental implications of lower oil prices are not obvious because oil would displace lower-emitting gas as well as higher-emitting coal. Lower oil prices also could stimulate increased economic activity, resulting in higher overall electricity growth, and perhaps even increased coal use and emissions.

If one assumes that oil (and possibly gas) prices will remain very low for a prolonged period of years, this could affect both emissions and cost results we have estimated for H.R. 4567. It is possible that oil and gas could replace some coal burning in the base case projection. This would reduce base emissions and emission rates, thus requiring smaller reductions, at lower cost, to meet the required targets. Switching to oil and gas is also possible as a compliance strategy. With very low fuel prices, this could reduce compliance costs somewhat.

On the other hand, lower fuel prices could stimulate higher electricity demands and higher base case emissions. In this case, the implementation of H.R. 4567 might require larger reductions and higher costs than we have projected. Also, total emissions after implementation of the reductions would be higher because the emissions rate requirements would be applied to higher total fuel use.

Evaluating the net effect of all if these possible responses would require a complex analysis. We have asked ICF to conduct more detailed analysis of this issue which will be incorporated into their final report.

Question 2.b.

[You referenced a March 3 letter from EPA to National Coal Association and then asked us the following questions.]

What actions has EPA taken or can it take to prevent such shifts to higher sulfur coal? Please explain the term "sulfur premiums," the range of amounts of such premiums, and their impact. Can we expect such premiums under this legislation if a utility opts to shift to low sulfur coal or some mixture of such coal? Please discuss the difficulty caused by these shifts in determining compliance with the emission caps in the bill.

Response:

There is nothing that EPA can do to prevent a powerplant which had previously been emitting at a level well below its SIP limit from increasing its emissions, as long as it remains below its legally sanctioned ceiling. Under current law, a state would have to justify any SIP changes on an ambient basis. However, under a congressionally mandated acid rain control program, states could tighten SIP limits to prevent emissions creep.

"Sulfur premiums" are the price differentials between high and low sulfur coal. They are related to the cost differences between mining and transporting low vs. high sulfur coal, as well as the higher demand for low sulfur coal created by environmental regulations. Sulfur premiums vary greatly. They depend upon such factors as plant location, competition among coal suppliers, access to transportation facilities, and the stringency of environmental requirements. Because coal markets are currently depressed, current premiums range from $0-5 per ton.

Under our base case forecast, by the year 2000 when coal market conditions have significantly improved, premiums of $4-15 are created. According to our analysis of the default emission cap in the HR 4567, in the year 2000 sulfur premiums would be somewhat higher than in the base case, ranging from $5-25.

Any legislation which precipitates large amounts of coal switching will create sulfur premiums. The creation of such premiums complicates the achievement of emission caps for two reasons. First of all, incentives are created for uncontrolled plants to use cheaper, higher sulfur coals. Secondly, all other things being equal, lower prices of high sulfur coal relative to low sulfur coal will encourage the utilization of high-emitting plants relative to low-emitting plants. In developing plans to implement a control program, States will have to be careful that they take into account the changes in coal quality and utilization that would occur, to ensure that they will actually meet requirements of the program.

EXPERT REPORT OF
WALTER C. BARBER

DUKE ENERGY CORPORATION

AUGUST 15, 2002

/s/ Walter C Barber
Walter C. Barber

III. Conclusions and Opinions.

My job duties as Director of OAQPS required me to be fully aware of the statutory provisions and Congressional intent that both authorized and guided my office's activities. My understanding of the relevant statutory provisions derived from many sources, including my participation in discussions within USEPA and my personal review of the statute and accompanying legislative materials. My understanding of the topics under OAQPS's responsibility reflects the nature and type of understanding common among policy-level agency personnel who had senior responsibility for developing regulations authorized by USEPA's operating statutes. The ensuing discussion regarding the CAA, therefore, provides context to this report and my opinions regarding the development of the NSR programs and the manner in which USEPA is now interpreting these programs.

In 1970, Congress enacted the CAA to establish nationwide air quality standards to protect public health and welfare. These national ambient air quality standards specify the maximum permissible concentration of certain air pollutants in ambient air required to protect the public health with an adequate margin of safety. Congress directed the States to prepare implementation plans to control emissions of these pollutants to ensure attainment

and maintenance of the national ambient standards within their borders. Existing stationary emission sources, old or new, must comply with emission limits sufficiently stringent to ensure attainment and maintenance of these national ambient standards. The national ambient standards and the state implementation plans designed to achieve those standards are two of the cornerstones of air pollution control in the United States.

In addition, Congress enacted several CAA provisions directed primarily at new sources of air pollution. In 1970, Congress enacted the NSPS provisions of the CAA. These provisions required USEPA to promulgate performance standards for new sources in certain industrial categories to regulate the emission of air pollutants from such sources. In 1977, Congress amended the CAA to expand the NSPS program and to add specific PSD and NNSR programs. The PSD provisions of the CAA responded to concerns that air quality in areas meeting the national ambient standards should not be permitted to degrade significantly. The NNSR provisions addressed areas that had not yet demonstrated that they could attain the national ambient standards. As a general rule, the application of all three statutory provisions, NSPS, PSD and NNSR, require new sources to install pollution control technologies often more stringent than controls required for similar existing sources to which these programs do not apply. In enacting these NSR provisions, Congress clearly distinguished between existing and new stationary sources. The NSPS, PSD and NNSR statutory provisions do not apply to existing sources, unless an existing source is changed to such an extent that it is "modified" within the meaning of such provisions.

During the development and promulgation of the NSR programs, OAQPS was keenly aware of the Congressional distinction between new and existing sources. As Director of the office, I ensured that OAQPS developed regulations designed to carry out Congress' determination both that new sources should be required to install stringent, technology-based air pollution controls and that, unless an existing source was "modified," existing sources should not be required to install or be retrofitted with such air pollution controls. Consistent with the statutory principles and Congressional intent, OAQPS developed regulations providing that those existing sources would be addressed, if needed, through a state's regulation of existing sources under its state implementation plan.

As applied to the electrical utility industry, OAQPS developed regulations primarily addressing new sources. Existing sources (the vast majority of which at that time were coal-fired steam generating facilities) were required to be retrofitted with enhanced air pollution control devices only when those sources were changed to such an extent as to render them "modified," which was something that was expected to occur only rarely. Three of the critical bases for this mindset are as follows. First, as I have discussed above, OAQPS understood that Congress did not intend to develop regulations that would provide for extensive retrofitting of existing sources. Second, OAQPS believed that, in general, requiring existing electric generating power plants to be retrofitted with new control technologies would not be cost-effective. Finally, in developing regulations, OAQPS was always mindful of the country's increasing demand for energy, its vulnerability to foreign sources of energy, and the increasing role coal

was playing as a relatively affordable and available source of domestic energy.

When USEPA promulgated implementing regulations for the NSR programs, it addressed several activities at existing sources that it determined should not trigger the NSR programs. One set of these activities is routine maintenance, repair and replacement at an air pollution source. Given the relative newness of the PSD and NNSR regulations during my tenure as Director of OAQPS, most of our experience regarding what level of activity at an existing source would be considered a modification and trigger NSR came from the NSPS program.

During my tenure as Director of OAQPS, to trigger NSPS, the activity at the source had to be sufficient to increase the capacity of a source to emit air pollutants or to emit a new pollutant not previously emitted. If the source were engaged in activities necessary to maintain the plant's current operating conditions or return itself to its original operating capacity, OAQPS did not consider those activities to trigger NSPS. For example, if a plant, which operated at a 100-megawatt capacity when originally built, declined over time and needs to conduct repairs or replace parts to return to its original 100-megawatt operating capacity, absent extraordinary circumstances, OAQPS did not consider those activities to trigger NSPS.

Another activity that OAQPS generally would not consider to trigger NSPS was an increase in hours of operation at an existing plant. It was our belief that activities that allowed a source to operate more hours did not trigger NSPS unless those activities also increased the capacity of that source to emit pollutants. Thus, if a plant's

hours of operation decline because of problems associated with a key component, such as an economizer or a reheater, and if such components were replaced or repaired and the plant increased hours of operation thereafter, this would not trigger NSPS.

OAQPS carried over into the PSD and NNSR regulations the general mindset regarding the magnitude and scale needed to trigger a modification developed under the NSPS program and the specific NSPS definitional terms of "modification," "routine maintenance repair and replacement" and "increased hours of operation" and our interpretations thereof. Furthermore, as used in the PSD and NNSR programs, OAQPS gave these terms the same meaning and intent as in the NSPS program and believed that the same order of magnitude and scale needed to trigger NSPS would apply to the PSD and NNSR programs.

During my tenure as Director of OAQPS, it was both my own, and I believe USEPA's intention that relatively few existing coal-fired power plants would be brought within the NSR programs through the modification provisions. In fact, it was both our intent and expectation that very few existing power plants would be required to be retrofitted with new control technologies. If USEPA is now interpreting these regulations so that a significant number of existing power plants would trigger NSR and require retrofitting of controls, then I believe that such an interpretation is beyond the intent of the controlling statute and implementing regulations promulgated during my tenure.

I have reviewed the summary of a census of electric utility industry maintenance, repair and/or replacement

activities contained in Comments of The Utility Air Regulatory Group, filed on September 17, 2001 with USEPA in Docket No. A-2001-19 regarding the New Source Review 90 Day Review. If USEPA is now interpreting the NSR regulations so that maintenance, repair and replacement activities such as the commonplace activities listed in this summary, including replacement of key boiler components at existing power plants, typically would cause these plants to fall within the NSR programs and require retrofitting with updated control technologies, then I would be surprised at that interpretation and believe that such an interpretation would be inconsistent with the intent of the NSR programs as passed by Congress and as promulgated by USEPA.

Furthermore, I believe that applying the modification provision of the NSR programs in that way during my tenure at OAQPS would have found little, if any, support in USEPA or the Carter Administration in general. For example, the 1978 Electric Utility Steam Generating Units Background Information Document (July, 1978) confirms my view, and USEPA's view at the time, that the replacement of the pulverizer system of an existing coal-fired unit, a key component of a boiler, with a similar system, or replacement of component parts of the pulverizer system, would not be considered a modification (page 5-4.) Indeed, only a major redesign of key components of a steam generation system would cause a source to be evaluated under the modification regulations. In further support of this view, the background document states that there was little possibility that existing boilers would be subject to the modification and reconstruction provisions of the CAA (page 1-83).

Finally, it was neither mine nor USEPA's intention that the NSR programs would be used as a vehicle to require the vast majority of existing coal fired power plants to be retrofitted with updated control technologies. If USEPA were to find or be presented with new information regarding an underlying assumption used in establishing the NSR programs, or just wishes to change the policy decisions contained therein, then the appropriate course of action would be to return to the rulemaking process or even the authorizing legislation and seek amendments based on this new information or desire. In my opinion, it would be inappropriate to act on such new information or desires by, in effect, informally changing long standing regulations and advocating these changes through enforcement actions.

EXHIBIT 16

[LOGO] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
AIR, NOISE AND RADIATION

Apr. 21, 1983

MEMORANDUM

SUBJECT: PSD Applicability Determination-
Southwestern Public Service Company

FROM: Director,
Stationary Source Compliance Division
Office of Air Quality Planning and Standards

Acting Associate General Counsel
Air, Noise and Radiation Division

TO: Allyn M. Davis, Director
Air and Waste Management Division, Region VI

Paul Seals
Regional Counsel, Region VI

This is in response to your memorandum dated February 18, 1983 concerning the applicability of PSD to the Southwestern Public Service Company's (SPS) steam electric generating station in Amarillo, Texas. SPS operates a coal-fired steam generating unit subject to the NSPS requirements of 40 CFR 60 Subpart D. SPS is proposing to modify its existing air pollution control system which consists of two electrostatic precipitators (ESP) with 95 percent control efficiency of particulate matter followed by six wet scrubbers which remove enough of the remaining particulate matter to comply with the particulate matter emission standard of the NSPS. The

scrubbers also provide a significant effect on the SO_2 emissions by reducing their amounts by approximately 40 percent. These scrubbers, however, are not necessary in order for SPS to comply with the SO_2 requirements of the NSPS. The control alternative SPS has selected for this purpose is low sulfur coal.

The modification that SPS is proposing is the removal of the scrubbers and an upgrading of their ESP which will maintain their present level of compliance with the particulate matter NSPS. However, removal of these scrubbers will result in an approximate increase of 4400 tons per year of SO_2. The question you raise then is, does this modification of the control system constitute a major modification for the purposes of PSD?

Previously it has been determined that this change would not constitute a modification under the NSPS program. The NSPS regulations at 40 CFR 60.14(e) contain a list which exempts certain changes from consideration as modifications. Included in this list is the provision at 40 CFR 60.14(e)(5) which states:

> "The addition or use of any system or device whose primary function is the reduction of air pollutants except when an emission control system is removed or is replaced by a system which the Administrator determines to be less environmentally beneficial."

Under this provision it was determined that SPS' proposed modification would not be less environmentally beneficial for NSPS purposes since the change contemplated by SPS would still result in compliance with the NSPS for both particulate matter and SO_2.

The separate question of PSD applicability arises because the PSD modification provisions do not specifically contain an exemption such as that at §60.14(e)(5). After consultation with the Office of General Counsel, we both agree with the rationale presented by the Texas Air Control Board (TACB) in their January 21, 1983 letter to Dick Whittington. TACB believes that since the NSPS regulations provide an exemption from the modification provisions for replacement of control equipment, the PSD regulations must provide this exemption as well. This is because the Clean Air Act provides in Section 169(1)(c) that for PSD purposes the term modification shall be defined as that term is defined in Section 111(a) of the Act relating to NSPS. EPA has interpreted this to mean that for PSD purposes Congress intended the term modification to include all exemptions included in the NSPS regulations promulgated under Section 111 of the Act prior to the date of enactment of Section 169. See 43 FR 26396. The control equipment exemption was promulgated prior to Section 169. Therefore, the term modification in the PSD regulations inherently encompasses the control equipment exemption.

I wish to add, however, that just because it was determined that the change was not less environmentally beneficial under the NSPS program does not mean the same conclusion must be drawn with regard to PSD. Under the PSD program the concern is not solely the application of best technology, but also impacts on air quality from industrial growth. The Region and State must evaluate this situation to ensure there will be no adverse air quality impact before concluding that the control equipment replacement will not be less environmentally beneficial. If this determination can be made, the

SPS generating station in Amarillo may be exempted from PSD as a major modification.

If you have any additional questions or comments concerning this response, please contact Rich Biondi of SSCD at 382-2831 or Sara Schneeberg of OGC at 382-7730.

/s/ Edward E. Reich
Edward E. Reich

/s/ Wm. F. Pederson
William F. Pederson

cc: Peter Wyckoff
Mike Trutna
Tom Diggs

EXHIBIT 23

[LOGO] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF ENFORCEMENT

Jun. 24, 1981

Mr. Amasjit S. Gill
General Electric – Gas Turbine Division
One River Road
Schnectady, New York 12345

Dear Mr. Gill:

This is to respond to your letter of May 19, 1981, requesting a determination of the applicability of NSPS and PSD to stationary gas turbines converting from middle distillates to natural gas.

The information presented in your letter indicated that NO_x and So_2 emissions will decrease after the conversion to natural gas and hydrocarbons, CO and particulate emissions will either remain the same or decrease. As you correctly pointed out in your letter, the NSPS would only apply if there is an increase in emissions of a pollutant to which the standard applies. The NSPS for gas turbines applies only to NO_x and So_2 emissions. Since the conversion from middle distillate fuel to natural gas for the turbines in question will cause a decrease in NO_x and So_2 emissions, it is not considered a modification as defined in 40 CFR 60.14(a). The turbines however, could be subject to the NSPS if the conversion falls under the definition of reconstruction (See 40 CFR 60.15).

PSD review would apply to a proposed modification at an existing major stationary source if it would cause a

significant net increase in actual emissions of any regulated pollutant. In the case of the gas turbine conversions outlined in your letter, PSD applicability is determined by evaluating any change in emissions rates caused by the conversions. The data contained in your letter indicate that the emission rates after the conversion will either remain constant or decrease. Actual emissions could increase only if there is an increase in the production rate or hours of operation, both of which are specifically exempt from PSD review. (See 40 CFR 5221(b)(2)(iii)(f)). Therefore, since there will not be any increase in emission rates or any creditable increases in actual emissions, the conversion of the gas turbines will not be subject to PSD review.

If you have any questions concerning this determination please contact Janet Farelia of my staff at 202-755-2564.

Sincerely yours,

/s/ Edward E. Reich
Edward E. Reich, Director
Division of Stationery
Source Enforcement

cc: Peter Wyckoff
Mike Trutna

GENERAL [LOGO] ELECTRIC

GENERAL ELECTRIC COMPANY
ONE RIVER ROAD, SCHENECTADY,
NEW YORK 12345
Telephone
(518) 385-4131

GAS TURBINE
DIVISION
OPERATIONAL PLANNING

May 19, 1981

Copy: Don R. Goodwin, EPA
Research Triangle
Park, NC 27711

Mr. Edward Reich, Director
Division of Stationary Source Enforcement
Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Dear Mr. Reich:

Stationary Gas Turbines
Converting from Distillate to Natural Gas

The Economic Regulatory Administration of the Department of Energy grants temporary public interest exemptions, from the prohibitions of the Fuel Use Act of 1978, to burn natural gas where such use displaces the use of middle distillates, thereby decreasing our reliance on imported oil.

Existing gas turbines, which do not have built-in dual-fuel capability, must install new combustion hardware so that they can burn natural gas instead of middle distillates. The concern arises whether such a conversion would be calssified a "modification" or "major modification" and, therefore, subject the gas turbine to the New Source Performance Standards (NSPS) or a Prevention of Significant Deterioration (PSD) review.

MODIFIED

The definition of modification is provided in 40 *CFR* 60 as:

> 60.14 (a) "Except as provided under paragraphs (e) and (f) of this section, any physical or operational change to any existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a *standard* applies shall be considered a modification within the meaning of Section III of the Act . . . "
>
> 60.2 "'Standard' means a standard of performance proposed or promulgated under this part."

NEW SOURCE PERFORMANCE STANDARDS (NSPS)

Hydrocarbons, carbon monoxide and particulates are specifically excluded from the NSPS promulgated on Sept. 10, 1979. Justification for the exclusion was provided in the Oct. 3, 1977 *Federal Register* on page 53783.

> "HC and CO emissions from stationary gas turbines operating at peak load are relatively low because the higher the percentage of peak load at which a turbine operates, the more efficient the combustion of the fuel. Gas turbines normally operate at 80 to 100 percent of peak load with HC emissions averaging less than 50 ppm and CO emissions averaging less than 500 ppm at 15 percent oxygen. HC and CO emissions from stationary gas turbines, therefore, were not selected for control by standards of performance."
>
> "Particulate emissions from stationary gas turbines depend on the ash content of the fuel and

are minimal. Consequently, particulate emissions from stationary gas turbines were not selected for control by standards of performance."

Since there is no standard for CO, unburned hydrocarbons and particulates under NSPS for stationary gas turbines, NSPS would not apply even if there was an increase in the emission rate of these three pollutants. As shown in the attached four tables, NO_x and SO_2 decrease, and CO, unburned hydrocarbons and particulates remain unchanged or decrease.

PREVENTION OF SIGNIFICANT DETERIORATION (PSD)

PSD review would apply if the emissions increase by amounts greater than de minimis levels. De minimis levels, shown on page 52709 in the August 7, 1980 *Federal Register*, are:

	Tons/Year	Equivalent lbs/hour (8760 hours/year)
Carbon Monoxide	100	22.83
Nitrogen Oxides	40	9.13
Sulfur Ofoxide	40	9.13
Particulates	25	5.70
Volatile Organic Compounds	40	9.13

For those machines which are not restricted to a specific number of hours of operation per year by an enforceable permit condition, allowable emissions would be the hourly emission rate multiplied by 8760 hours per year. Then, for PSD review purposes, net emissions increases should be evaluated against these allowable emissions to see if de minimis levels are exceeded.

PG7101E

FUEL →		NATURAL GAS		DISTILLATE	
LOAD →		BASE	PEAK	BASE	PEAK
Output,	kW	74,400	80,500	72,900	78,800
Heat Rate (LHV),	Btu/kWH	10,690	10,640	10,790	10,750
Fuel Consump. (LHV) 10^6 Btu/hr		795.3	856.5	786.6	847.1
NOx as NO2,	lbs/hr	450	535	790	970
*SOx as SO2,	lbs/hr	0	0	254	275
Particulates,	lbs/hr	< 28	< 30	28	30
Hydrocarbons, (as CH_4),	lbs/hr	< 12	< 12	12	12
CO,	lbs/hr	< 21	< 21	21	21

*Distillate Fuel with 0.3% Sulfur by Weight,
Natural Gas Fuel Containing no Sulfur.

The results are based on field and combustion laboratory test data from the same or similar machines and combustion systems, correlated to provide a coherent body of emissions data. The data presented are for operation at ISO conditions.

PG7851

FUEL →		NATURAL GAS		DISTILLATE	
LOAD →		BASE	PEAK	BASE	PEAK
Output,	kW	61,300	67,700	60,000	66,300
Heat Rate (LHV),	Btu/kWH	11,000	10,920	11,130	11,030

Fuel Consump. (LHV) 10^6 Btu/hr		674.3	739.3	667.8	731.3
NOx as NO2,	lbs/hr	325	405	510	640
*SOx as SO2,	lbs/hr	0	0	216	237
Particulates,	lbs/hr	<24	<26	24	26
Hydrocarbons, (as CH_4),	lbs/hr	<11	<11	11	11
CO,	lbs/hr	<19	<19	19	19

*Distillate Fuel with 0.3% Sulfur by Weight,
Natural Gas Fuel Containing no Sulfur.

The results are based on field and combustion laboratory test data from the same or similar machines and combustion systems, correlated to provide a coherent body of emissions data. The data presented are for operation at ISO conditions.

PG5341P

FUEL →		NATURAL GAS		DISTILLATE	
LOAD →		BASE	PEAK	BASE	PEAK
Output,	kW	24,620	26,600	24,110	26,050
Heat Rate (LHV),	Btu/kWH	12,300	12,200	12,450	12,340
Fuel Consump. (LHV) 10^6 Btu/hr		302.8	324.5	300.2	321.5
NOx as NO2,	lbs/hr	140	155	200	225
*SOx as SO2,	lbs/hr	0	0	97	104
Particulates,	lbs/hr	< 11	< 11	11	11
Hydrocarbons, (as CH_4),	lbs/hr	< 5	< 5	5	5
CO,	lbs/hr	< 10	< 10	10	10

*Distillate Fuel with 0.3% Sulfur by Weight,
Natural Gas Fuel Containing no Sulfur.

The results are based on field and combustion laboratory test data from the same or similar machines and combustion systems, correlated to provide a coherent body of emissions data. The data presented are for operation at ISO conditions.

PG6441A

FUEL →		NATURAL GAS		DISTILLATE	
LOAD →		BASE	PEAK	BASE	PEAK
Output,	kW	31,750	34,750	31,100	34,000
Heat Rate (LHV),	Btu/kWH	11,280	11,210	11,380	11,310
Fuel Consump. (LHV) 10^6 Btu/hr		358.1	389.5	353.9	384.5
NOx as NO2,	lbs/hr	185	220	325	385
*SOx as SO2,	lbs/hr	0	0	115	125
Particulates,	lbs/hr	< 13	< 14	13	14
Hydrocarbons, (as CH_4),	lbs/hr	< 6	< 6	6	6
CO,	lbs/hr	< 11	< 11	11	11

*Distillate Fuel with 0.3% Sulfur by Weight,
Natural Gas Fuel Containing no Sulfur.

The results are based on field and combustion laboratory test data from the same or similar machines and combustion systems, correlated to provide a coherent body of emissions data. The data presented are for operation at ISO conditions.

EXHIBIT 24

[LOGO] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF ENFORCEMENT

Jan. 22, 1981

MEMORANDUM

SUBJECT: PSD Applicability

FROM: Director
Division of Stationary Source Enforcement

TO: Charles Whitmore, Chief
Technical Analysis Section, Region VII

This is in response to your memo of December 4, 1980, in which you requested a PSD applicability determination for Cargill Inc.'s proposed ethanol plant in Eddyville, Iowa.

The proposed plant is to be located in a designated attainment area and will consist in part of wet-milling and ethanol facilities (collectively, the "ethanol plant"). Steam and electricity for the plant are to be generated by an on-site existing power plant, which is to be converted into a co-generation unit. The addition of the ethanol plant will cause a large increase in the hours of operation of the power plant and a fuel switch to burn coal exclusively.

I would like to mention first that the project may be exempt from PSD review through a "grandfather" exemption if the state air permit for the project was issued before August 7, 1980, the project would not have been subject to

the 1978 PSD regulations, as stayed, and certain other conditions are met. (See 40 CFR 52.21 (i)(4)(V)).

If the grandfather exemption does not apply the addition of the ethanol plant should be considered a modification to an existing major stationary source. In order to determine if the modification is major and subject to preconstruction PSD review, it is first necessary to determine if there will be a significant net emissions increase from the modification itself. EPA is interpreting the term "net emissions increase" as any *significant* increase in actual emissions from a physical change or change in the method of operation at a stationary source and any other creditable contemporaneous increases or decreases in actual emissions. A conforming amendment to this effect will be published in the *Federal Register*. In this case there is an expected increase at the ethanol plant of approximately 15 TPY of TSP, 11 TPY of SO_2 and less than 40 TPY VOC. All of these emission rates are de minimus, (See 40 CFR 52.21(b)(23)) and therefore this modification would not be subject to PSD review. Regardless of whether or not this is determined to be a modification any increase in emission will consume increment provided the baseline has been triggered.

It is also important to note that, in the absence of any SIP or permit limitations, neither the increase in emissions from the switch to burn coal exclusively nor the increase in hours of operation at the power plant would be considered a modification (See 40 CFR 52.21(b)(2)(iii)(*e*) and (*f*)).

This determination has been made with the concurrence of the Office of Air Quality Planning and Standards and the Office of General Counsel. If you have any questions

regarding this memo, please contact Janet Littlejohn of my staff at 755-2564.

/s/ Edward E. Reich
Edward E. Reich

cc: Peter Wyckoff, OGC
Mike Trutna, OAQPS
Darryl Tyler, OAQPS

EXHIBIT 29

[LOGO] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20450

Oct. 14, 1988

THE ADMINISTRATOR

Mr. John W. Boston
Vice President
Wisconsin Electric Power Company
Post Office Box 2046
Milwaukee, Wisconsin 52301

Dear Mr. Boston:

As you requested in our meeting on September 15, 1988, I have made final determinations regarding the applicability of the Clean Air Act's New Source Performance Standards (NSPS) and Prevention of Significant Deterioration (PSD) requirements to the proposed life extension project at the Port Washington steam electric generating station, which is owned and operated by Wisconsin Electric Power Company (WEPCO). For the reasons discussed below, I have determined that, as proposed, the renovations at Port Washington are subject to both PSD and NSPS requirements. However, EPA remains willing to work with you regarding methods of compliance. As we have discussed, one alternative would be to reconfigure the project such that no emissions increases would occur. My staff is ready to meet with you to discuss these matters at any time.

I. BACKGROUND

On September 12, 1988, David Kee, Director Air and Radiation Division, EPA Region V, wrote you regarding PSD and NSPS coverage of the Port Washington renovations. Enclosed with that letter was a memorandum dated September 9, 1988 from Don R. Clay, Acting Assistant Administrator, addressing the background of the Port Washington project, and analyzing at some length the relevant interpretative issues. For purposes of brevity, I will not repeat that material here, but rather incorporate it by reference.

The September documents concluded that the life extension project, as proposed, *likely* would be subject to PSD and NSPS requirements. However, EPA also stated that final applicability determinations could not be provided at that time in the absence of certain factual information. In our subsequent meeting you requested that EPA furnish final determinations, and agreed to provide the necessary additional information. You also asked EPA to reconsider certain of the conclusions in Don Clay's memorandum. These matters are discussed below.

II. FINAL DETERMINATIONS

Your staff has responded to our requests for additional information, and I want to thank you for WEPCO's continued cooperation in doing so. Based on this, and the other information in EPA's files, I now make the following final determinations:

(1) The life extension project, as proposed, will render WEPCO's Port Washington plant subject to the PSD requirements of Part C of the Clean Air Act as a

major modification within the meaning of the Act and the EPA regulations at 40 C.F.R. § 52.21.

(2) The proposed life extension project will render each of the five steam generating units at the Port Washington plant subject to the NSPS requirements of section 111 of the Clean Air Act as modification within the meaning of the Act and the EPA regulations at 40 C.F.R. Part 60.

In reconsidering the memorandum and letter of September 9 and 12, I have taken a careful look at the issues you raised in our meeting: whether the renovations are routine; whether EPA has treated similar projects in a different fashion; and whether there would be an emissions increase due to a physical or operational change. However, I find no reason to depart from the reasoning of the September documents. Accordingly, I conclude that WEPCO's life extension project, if carried out as proposed, will involve a substantial and non-routine renewal of the Port Washington facilities that will significantly increase both hourly maximum and annual emissions of air pollutants.

Specifically, regarding the nature of the proposed work at Port Washington, I find that these renovations constitute physical changes for PSD purposes within the meaning of 40 C.F.R. § 52.21(b)(2)(i), and physical and operational changes for NSPS purposes within the meaning of 40 C.F.R. § 60.14(a). I find further that these changes do not come within the PSD and NSPS exclusions for routine maintenance, repair, and replacement, nor the exclusions for increases in production rate or hours of operation. (See 40 C.F.R. §§ 52.21(b)(2)(iii) and 60.14(e)).

Regarding the emissions changes from the life extension project, based upon the emissions data and certain factual assertions submitted by WEPCO, I find that the Port Washington renovations will result in a significant net increase in emissions of several pollutants for PSD purposes within the meaning of 40 C.F.R. § 52.21(b)(2)(i), (b)(3), and (b)(21). I find further that the renovations will result in an increase in the emission rate of several pollutants at each of units 1-5 for NSPS purposes within the meaning of 40 C.F.R. § 60.14(a) and (b).

Enclosures A and B detail the emissions changes underlying these findings for PSD and NSPS purposes. As indicated above, EPA's calculations and determinations are based on data supplied by WEPCO. We will use the data in Enclosures A and B in the event you would like to work with us to establish an acceptable arrangement for satisfying PSD and NSPS requirements through the addition or enhancement of pollution control equipment, physical capacity restrictions, or, in the case of PSD, federally enforceable limitations on potential emissions.

III. DISCUSSION

As you requested, I have reconsidered the question of whether the physical and operational changes at Port Washington are routine, whether applying PSD and NSPS here would be inequitable in light of EPA's past treatment of renovation projects, and whether the renovations will result in emissions increases. These matters are addressed below, as is EPA's reasoning with respect to the baselines for calculating the PSD and NSPS emissions increases reflected in Enclosures A and B.

Regarding the question of routineness, the renovations involve the replacement of steam drums, air heaters, and other major components that are integral to the continued operation of the source. The work will not simply maintain the facilities in their current state, but rather will significantly enhance their present efficiency and capacity, and substantially extend their useful economic life. In addition, the work called for here is rarely, if ever, performed. Moreover, this work is costly, both in relative and absolute terms. Based on these and other factors, I reaffirm Don Clay's findings on the non-routine character of the Port Washington changes. The September 9 memorandum contains a complete discussion of EPA's reasoning on this issue.

On the related equity question, I find no inconsistency here with EPA's prior determinations regarding routine and non-routine changes. I note initially that PSD and NSPS applicability determinations are made on a case-by-case basis. Thus, it is very difficult to analogize to other projects, which almost inevitably present significant factual differences. Nevertheless, my staff has reviewed the additional material you submitted on September 19, and September 27, 1988 regarding certain other renovation projects, and has informally surveyed EPA Regional Offices and state agencies.

I have concluded that none of the four steam drum replacements identified in your September 19 submission are sufficiently similar to the Port Washington project to support determinations of nonapplicability in this matter. The Carolina Power and Light case involved a faulty steam drum replaced prior to the initial start-up of a new unit, and would not have increased emissions for PSD or NSPS purposes. The Great Western Sugar example did not

involve a utility boiler, and was too small to be affected by NSPS. The Ashland Oil facility was not at a utility, involved a waste heat boiler that was not fossil-fuel fired, and hence, was not an emissions unit subject to PSD or NSPS. The Algoma Steel Co. facility was not a utility boiler, and not located in the United States.

In addition, the informal survey conducted by the Office of Air and Radiation disclosed no closely analogous cases that were ever reviewed by EPA headquarters for purposes of PSD or NSPS applicability. In particular, EPA found no examples of steam drum replacement at aged electric generating facilities. Moreover, EPA could find no examples in which the Agency had analyzed and issued an applicability determination for a "life extension project" for any category of major source. Regarding the four utility projects identified in your September 27 submission, I note that they do not involve steam drum replacement. In addition, permit applications were not submitted to the state agencies for the Duke Power and Texas Utilities projects you cite. Consequently, they were not reviewed by any air pollution control agency. The Cincinnati Gas and Electric project was reviewed by the state, but not EPA. The state determined, and EPA Region II concurred, that the Hydraco Enterprises project was not subject to PSD based on a net decrease in emissions of all pollutants. Our informal survey and review of the projects you identified reveal that major construction activities undertaken by utilities that may be subject to Clean Air Act requirements have not been brought to the attention of EPA. The Agency is considering what steps, may be necessary to address this situation.

EPA has discovered only two state agency determinations addressing life extension questions in a manner

possibly inconsistent with EPA's analysis of the Port Washington project. These instances, which apparently were not brought to EPA's attention prior to the states' determination, do not create an inequity that would justify a different conclusion by EPA in this case.

As to the question of emissions increases at Port Washington, I believe that EPA has properly interpreted the PSD and NSPS regulations as applying to increases in emissions due to increases in hours of operation or production rate, where, as here, such operational or production increases are closely related to physical or operational changes. A contrary interpretation would allow even massive emissions increases stemming from significant new capital investment – as distinguished from routine fluctuations in the business cycle – to escape scrutiny under the Clean Air Act simply because the new investment did not involve an inherently more polluting production process. I do not believe that Congress intended such a result.

I would like to point out that the figures on emissions increases in Enclosures A and B reflect my conclusions regarding the proper points in time from which to calculate emissions changes. For PSD, I have determined under 40 C.F.R. § 52.21(b)(21)(ii) that the two-year period of 1983 and 1984 – prior to the source curtailments due to discovery of cracks in the rear steam drums – are more representative of normal source operations than the most recent two-year period. This conclusion is appropriate in light of WEPCO's historical operations.

As to NSPS, there is no "representative emissions" concept under that program. Rather, under the circumstances presented by this case, the baseline emission rates

for units 1-5 are determined by hourly maximum capacity just prior to the renovations. At this time, EPA is relying on the actual operating data you submitted to determine current maximum capacity. Although EPA is certainly open to further discussion on this point, the information contained in your September 27 and October 11, 1988 submissions is inadequate to support WEPCO's assertions that higher-than-actual capacities could be achieved on an economically sustainable basis. For example, you indicate that operation at higher levels at units 1-4 "could increase equipment deterioration thus causing further damage." Regarding Unit 5, you state that "safety concerns" dictated the decision to shut down that unit. Based on this information, we are unable to rely on WEPCO's statements as to maximum "achievable' capacity in determining the emissions changes at each of these units. Thus, for example, in the case of unit 5, the current capacity must be regarded as zero.

IV. CONCLUSION

In adopting the PSD and NSPS programs, Congress intended to address the type of long-term capital investments in pollution-emitting facilities at issue in the Port Washington life extension project. Thus, as proposed, these renovations would be subject to the requirements of both programs. However, as indicated above, my staff remains ready to work closely with WEPCO to discuss specific pollution control equipment and permitting measures that would minimize the cost to WEPCO of complying with the requirements of the Clean Air Act. I have asked Don Clay to work with you in seeking a final resolution of the compliance issues by December 1.

Again, thank you for your cooperation is this matter.

Sincerely,

/s/ Lee M. Thomas
Lee M. Thomas

Enclosures

cc: Senator Robert W. Kasten, Jr.
Representative F. James Sensenbrenner, Jr.
Don Clay, EPA (ANR-445)
David Kee, Air & Radiation Div., Region V

Enclosure A

PSD Applicability

Port Washington Power Plant Renovation Project

(all emissions calculations are in tons per year)

Pollutant	Actual Emissions Baseline (1)	Potential Emissions (2)	Net Emissions Increase	PSD Level	Subject to, PSD Review
Total suspended particulate	170	283 (3)	108	25	yes
Sulfur dioxide	24,234	52,621 (3)	28,385	40	yes
Nitrogen oxides	2,991	8,201	5,210	40	yes
Carbon monoxide	144	397	253	100	yes
Hydrocarbon	17	47	30	40	no
Beryllium	0.0016	0.005	0.0034	0.0004	yes
Fluorides	38	98	60	3	yes

NOTE: PSD applicability for the other PSD regulated pollutants listed at 40 CFR Section 52.21(b)(23)(i) and (ii) has not been determined at this time.

1) Average emissions for two-year period defined by calendar years 1983 and 1984.

2) As calculated by WEPCO based on 1992 coal type, actual emissions after ESP, and an annual capacity utilization factor of 90%.

3) An EPA estimate of potential emissions, based on existing federally enforceable limits (i.e., applicable SIP), may be higher. The indicated PSD applicability determination would, however, not change.

Enclosure B

NSPS Applicability
Port Washington Power Plant Renovation Project

FULL LOAD EMISSIONS AT CURRENT CAPACITY (BEFORE RENOVATION)

	UNIT-1	UNIT-2	UNIT-3	UNIT-4	UNIT-5
SO_2 (LBS/HR)	1417	1828	2043	1580	-0-
PM (LBS/HR)	15	16	12	12	-0-
NOx (LBS/HR)	480	352	289	221	-0-

FULL LOAD EMISSIONS AT FUTURE CAPACITY (AFTER RENOVATION)

	UNIT-1	UNIT-2	UNIT-3	UNIT-4	UNIT-5
SO_2 (LBS/HR)	2046	2037	2088	2269	2695
PM (LBS/HR)	16	16	12	17	15
NOx (LBS/HR)	696	392	297	316	369

SUBJECT TO NSPS
(AFTER RENOVATION)

	UNIT-1	UNIT-2	UNIT-3	UNIT-4	UNIT-5
SO_2 (LBS/HR)	YES (a)	YES (a)	YES (a)	YES (a)	YES
PM (LBS/HR)	YES (b)	NO	NO	YES (b)	YES
NOx (LBS/HR)	YES (c)	YES (c)	YES (c)	YES (c)	YES (c)

Notes:

(a) With less add-on control than NSPS requirement, emissions (lb/hr) would not increase and NSPS would not apply.

(b) Because of planned ESP upgrade, PM emissions (lb/MM Btu) after renovation are expected to be less than NSPS requirement. However, NSPS would require CEMS for opacity.

(c) Because arch-fired boilers are used at Port Washington, current NOx emissions (lb/MM Btu) are expected to be less than NSPS requirements. However, NSPS would require a CEMS for NOx.

EXHIBIT 31

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION V

DATE: MAR. 25, 1988

SUBJECT: PSD Applicability for a Power Plant Life Extension Project

FROM: David Kee, Director
Air and Radiation Division

TO: Gerald A. Emison, Director
Office of Air Quality Planning and Standards

I am requesting guidance on a Prevention of Significant Deterioration (PSD) applicability determination. Wisconsin Electric Power Company (WEPCO) intends to renovate its Port Washington plant. The Wisconsin Department of Natural Resources (WDNR) has asked if the United States Environmental Protection Agency (USEPA) considers these renovations subject to the requirements for a "major modification" in the Federal PSD regulations in 40 CFR 52.21. A physical change or change in the method of operation of a major stationary source is subject to PSD. However, an increase in the hours of operation or the production rate is not considered a physical change or change in the method of operation [see 40 CFR 52.21(b)(2)(iii)(f)]. WEPCO believes the renovation project is merely an increase in production which is not subject to PSD regulations.

WEPCO operates five coal-fired boilers at the Port Washington plant. One boiler has been shut down for 3 years due to a cracked steam drum. The others have not been able to operate at full capacity due to degradation. Some of

the boilers have suffered more degradation than others as illustrated below:

	Generator Nameplate (megawatts)	1986 Summer Capability* (megawatts)	Year of Initial operation
Unit 1	80	49.0	1935
Unit 2	80	69.0	1943
Unit 3	80	78.0	1948
Unit 4	80	57.0	1949
Unit 5	80	75.0	1950

*From *Inventory of Power Plants in the United States 1986.* Energy Information Administration

The renovations are intended to restore the boilers to their nameplate capacities and to allow them to operate until 2010. Plantwide capacity would increase about 40 percent above current levels to 400 megawatts. Net emission increases of sulfur dioxide, particulate matter, and possibly other pollutants would be "significant." Capital expenditures will be required to restore the lost capacity because major boiler components will be replaced.

We are requesting concurrence with our determination that the WEPCO renovations are not exempt from PSD regulations under the provisions of 40 CFR 52.21(b)(2)(iii)(f). We consider this exemption to be only for increases up to the production rate that the source can operate at without altering equipment. In other words, an increase in production rate is exempt but a renovation that increases the production rate is not even though the renovation restores lost capacity.

Although the Port Washington plant may have been able to operate at 400 megawatts in the past, degradation has caused operational limitations that have restricted their

potential to emit. Our understanding is that an increase in actual emissions up to the potential to emit would be exempt under 40 CFR 52.21(b)(2)(iii)(f) but an increase in the potential to emit would not.

I have attached letters from Mr. Dale Ziege of WDNR dated November 9, 1987, and February 5, 1988, and from Mr. Mark Steinberg of WEPCO dated March 17, 1988. These letters comprise the State and company's request for an applicability determination.

We request your consideration of this applicability issue because boiler life extension projects appear to be on the increase nationwide and your determination here may impact numerous other projects. If you have any questions, please contact me or Bill MacDowell of my staff at FTS 886-6043.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Civil Action No. 1:00 CV 1262

UNITED STATES OF AMERICA,
Plaintiff,
v.
ENVIRONMENTAL DEFENSE, NORTH CAROLINA SIERRA CLUB, NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP
Plaintiff-Intervenors
v.
DUKE ENERGY CORPORATION
Defendant.

VIDEOTAPED I –
DEPOSITION OF WALTER STEVENSON
(Taken on behalf of the Defendant)
Durham, North Carolina
September 10, 2002

* * *

[42] [Q.] . . . Can you tell us whether you put together this Exhibit 175 before May 10, 1989?

A. Do you have that particular list with you so I can be sure? I believe I know what you're referring to. I just want to be sure I don't misstate.

MR. BECKHARD: While you're looking for that, can I ask for a short break? Comfort break.

VIDEOGRAPHER: We're off the record at 1:15.

VIDEOGRAPHER: We are on the record at 1:24.

BY MR. COTTINGHAM:

Q. Mr. Stevenson, before we took a break you said you wanted to look at what we call the Farmer memorandum which we looked at a number of times in other depositions. It is Exhibit 121 and 177. And I was asking you specifically about whether your list that you put together that's Exhibit 175 you put together before or after Mr. Farmer's memorandum dated May 10, 1989 which has an Attachment 3, a list of potential utility boiler life extension projects?

A. My list would have been put together prior to this list.

Q. So okay. Let's go back to your list, Exhibit 175 which is entitled "Known/Suspected Utility Life Extension/ Repowering Projects." When you use the term "life extension" on that list, first on the title and in the column type where [43] you use it, at least nine times, what did you mean by that, by life extension?

A. In the title or in the type?

Q. Either way, both.

A. The "type" is what the magazine article or whoever I read this, the term they used. I had no idea of what it necessarily meant. To the extent it was so common I just picked up whatever the most common and typed this up as just a working list. But again, that's why these terms – I just listed whatever was in the particular article subject.

Q. What did you mean in the title?

A. Up top it says "known/suspected/utility life extension repowering." What all that would mean come sometime in the future, I don't know for sure what they were even, the projects. This was the terminology used in these various articles I ran across. I don't know what they necessarily mean.

Q. And you didn't know what it meant when you wrote it at the top or typed it at the top of this document?

A. No. It was some of the more common terms. I think you see "life extension" "repowering" probably the two most common terms used in these articles so I just put it in there. I just typed this up.

Q. Why did you put this together?

A. Just working on projects over many years it just [44] seemed if the WEPCO determination had come up, it seemed like at some point somebody was going to ask should a study be done or how common it was. And to the extent I was running across these as I read things, I just typed up a list. I figured sometime in the future somebody could use it for something; but it was no particular, nobody asked me to put it together or anything. It was just a list I put together for efficiency.

Q. And you think you put it together sometime between September of 1988 when you and Sallie Harmon did the survey on life extension and May of 1989 when Mr. Farmer wrote his memorandum?

A. Yeah.

Q. What was happening during that time that related to life extension that would cause you to put together this memorandum?

A. Well, the sequence of events were that a determination was to be made on WEPCO, they made an application, they – so Sallie and I did a very quick survey to see if any determinations had been requested before and so forth. We continued to have discussions and meetings with WEPCO. They continued to submit data. We'd evaluate it and look at it in context of the NSPS program, and along that process reading these articles, like I say, these names started appearing. I put a list together. Ultimately the [45] Court made the decision all the briefs were filed and everything and the litigation was determined, the determination was made first, and then the litigation occurred. And then after the NSPS decision was completed, which again was one, that was that. We just went on to other projects.

Q. What did you do with this Exhibit 175 list after you put it together?

MR. BECKHARD: Objection. Outside the scope. You may answer in your personal capacity.

THE WITNESS: It just was put in my files, you know the WEPCO folder, just put it in there. Nobody particularly asked for it, but whether it was circulated I'd have to speculate, you know, somebody ask me for a copy about WEPCO. Nobody particularly asked me for this and it wasn't intentionally distributed to anybody. It just went in my files. We share a lot of data in our groups so everybody is pretty much aware of what was going on.

Q. Other people in your group were probably aware that you put together this list?

A. I have to speculate. It wouldn't surprise me either way. I don't remember distributing it to anybody. Don't remember anybody asking for it. I would expect, yeah.

* * *

EXHIBIT 33

[LOGO] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

Jun. 8, 1990

Mr. John Boston
President
Wisconsin Electric Power Company
Post Office Box 2046
Milwaukee, Wisconsin 52301

Dear Mr. Boston:

On January 19, 1990, the United States Court of Appeals for the Seventh Circuit in *Wisconsin Electric Power Co. v. Reilly*, Nos. 88-3264 and 89-1339, issued its decision regarding a challenge by Wisconsin Electric Power Company (WEPCO) to two final determinations issued by the Environmental Protection Agency (EPA). In these determinations, EPA concluded that WEPCO's proposed renovations to its Port Washington power plant would be subject to new source performance standards (NEPS) and prevention of significant deterioration (PSD) requirements.

In its decision, the court upheld all but one of the positions advanced by EPA in the NSPS and PSD applicability the issue of whether the "actual-to-potential" method – referred to by the court as the "potential to emit concept" – should be used to calculate emissions increases for PSD purposes in this case. Consequently, the Seventh Circuit vacated and remanded the PSD determination to EPA for further action consistent with the court's decision.

As you know, EPA decided to acquiesce in the court's holding rather than seek rehearing. This letter constitutes EPA's revised PSD applicability determination in responses to the court's remand order.

The Agency believes that the court's principal instruction – that EPA consider past operating conditions at the plant when addressing modifications that involve "like-kind replacements" – can be reasonably accommodated within the present regulatory framework without further litigation in this case. The net result of the court's ruling is the recognition of a subcategory of "like-kind replacements" under the "major modification" definition of EPA's new source review provisions.

As explained below, EPA will employ an "actual-to-actual" method to calculate emissions increases for WEPCO's proposed renovations to its Port Washington power plant. The outcome in this case is that WEPCO will not be subject to PSD review for sulfur dioxide (SO_2), particulate matter (PM), carbon monoxide, or hydrocarbons. However, there will be a significant net increase in actual emissions of nitrogen oxides (NOx), and WEPCO must obtain a PSD permit for that pollutant.

I. BACKGROUND

A. Factual Background.

The WEPCO owns and operates five coal-fired, steam-generating units at its Port Washington facility near Milwaukee. All units had an original design capacity of 80 megawatts when they were placed in service between 1935 and 1950. However, due to age-related deterioration and loss of efficiency, both the physical capability and actual utilization of the plant have declined over time. Unit 5 was

shut down completely due to a cracked rear steam drum. Consequently, by 1987, WEPCO was faced with removing the units from service as they reached their planned retirement dates beginning in the early 1990's, unless it undertook a costly "life extension" program to restore the physical and economic viability of the units and extend their useful life for approximately 20 years. The WEPCO proposed such a life extension to include replacement of the steam drums, air heaters, and other major capital improvements totaling over $80 million. It should be noted that this program is not a pollution control project (i.e., it is not intended to add on or improve pollution control systems even though modest improvements to the particulate matter control devices are a part of the program).

In a series of applicability determinations in 1988 and 1989, EPA ruled that the renovations planned under WEPCO'S life extension program would constitute a "modification" for purposes of the NSPS provisions of the Clean Air Act (Act), and a "major modification" under the PSD provisions of the Act. Thus, WEPCO would have had to install some level of control equipment or physical capacity restriction to avoid NSPS coverage for three of the five units proposed to be renovated. As to PSD, the company would have had to accept operational restrictions or lower emissions rates to "net out" of review. Regarding SO_2, for example, WEPCO could have almost doubled its projected level of future operations without triggering PSD review. However, WEPCO did not want to be constrained by new source requirements, and so sought review in the Seventh Circuit Court of Appeals.

B. The Court's Decision.

1. Physical Change.

The court unequivocally agreed with EPA that the replacement of steam drums, air heaters, and other major components was a nonroutine "physical change," and thus met the first of two tests for a modification under NSPS and PSD. The Agency found that the renovations proposed by WEPCO were exactly the type of industrial changes that were meant to be addressed by the NSPS and PSD progress. In upholding EPA's finding that a physical change would occur, the court strongly endorsed EPA's reading of the basic congressional intent in adopting the modification provisions of the NSPS and PSD programs, because to rule otherwise "would open vistas of indefinite immunity from the provisions of NSPS and PSD" (slip op. at 11). The court also relied on the reasonableness of EPA's consideration of the magnitude, purpose, frequency, and cost of the work in upholding EPA's finding that the renovations are not "routine" (slip op. at 14-18). In addition, the court rejected WEPCO's argument that the renovations could not be deemed a modification for NSPS purposes because they did not constitute a "reconstruction" under 40 CFR 60.15 (slip op. at 18-20).

2. NSPS Emissions Increase.

The court upheld EPA'S decision that there would be an increase in hourly emissions at three of the units, and thus for those three units, WEPCO met the second test for NSPS applicability. The Agency had argued that the regulations require NSPS emissions increases to be determined by comparing the current (pre-change) hourly emissions capacity of each affected facility with the post-renovation hourly

emissions capacity of each unit. The Seventh Circuit agreed, and rejected WEPCO's argument that original design capacity or past "representative" capacity no longer achievable at the plant should be used for the baseline emissions rate (slip op. at 20-25).

3. PSD Emissions Increase.

The regulatory preamble to the PSD regulations provides that the set of emissions units that have "not begun normal operations" includes both "new or modified" units (45 FR 52676, 52677, 52718) (1980). Consequently, EPA used the "actual-to-potential" calculus in evaluating WEPCO's life extension project. The court rejected this methodology in the case of WEPCO's "like-kind replacement," asserting that EPA's reasoning was circular (slip op. at 28). [In addition, the court held (slip op. at 27 n.11) that the exemption in 40 CFR 52.21(b)(2)(iii)(f) for emissions increases due to expanded operations did not apply because WEPCO's increased operations were directly tied to the life extension project.] Instead, the court ruled that EPA should recalculate post-change emissions considering past operating conditions where it is possible to make a more realistic assessment of future emissions (slip op. at 29-31). Alternatively, the court stated that EPA could conduct new rulemaking to explicitly apply the "actual-to-potential" calculus to "like-kind replacements" (slip op. at 30).

II. THE WEPCO DECISION IN THE CONTEXT OF THE PSD PROVISIONS

The Seventh Circuit held that EPA could not wholly disregard past operating history and automatically apply

the actual-to-potential methodology for determining PSD applicability to WEPCO's "like-kind replacements." In describing the WEPCO changes as "like-kind replacements" and limiting its decision to such changes, the court did not dispute the correctness of EPA's application of the actual-to-potential test to the full spectrum of new and modified sources not covered by this subcategory of change. The recent decision in *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292 (1st Cir. 1989), explicitly upheld EPA's position that the actual-to-potential concept should be applied to "modified" emissions units. The First Circuit case involved the modernization and reconfiguration of existing emissions units [see 889 F.2d at 293 (company planned to "convert kiln No. 6 from a 'wet' to a 'dry' cement-making process, and to combine that with Kiln No. 3")]. A key issue was whether EPA properly held that the "modified" units had "not begun normal operation" and therefore the actual-to-potential concept applied in calculating emissions increases. The First Circuit affirmed EPA's position that the actual-to-potential concept should be applied to the company's "modified" units. *Puerto Rican Cement*, 889 F.2d at 297. Consequently, the court found that both the language and expressed purpose of the regulations indicate that EPA applied the regulations properly in using the actual-to-potential test for a proposed modification. The Seventh Circuit in *WEPCO* did not dispute the correctness of EPA's application of the actual-to-potential test to the full spectrum of changes not covered by the subcategory of changes (like-kind replacements) created by the court.[1] Therefore, in the case of

[1] EPA will leave to future case by case applicability determinations what is a "like-kind replacement." But for guidance of the parties, EPA presently considers that only for projects that are genuine "like-kind

(Continued on following page)

nonroutine physical or operational changes at an existing major source which are not specifically "like-kind replacements" in nature, EPA will continue to apply the actual-to-potential test for PSD applicability purposes.

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replacements" can future emissions projections be calculated using "estimated future actual emissions" in lieu of potential to exit. EPA does not consider "like-kind replacements" to mean the entire (or reconstruction) of an existing emissions unit with an identical new one or one similar in design or function. Rather, EPA considers "like-kind replacements" to encompass the replacement of components. Under this interpretation of the term, new components that perform essentially the same function as old ones will be viewed as "like-kind replacements." In addition, even if the design or purpose of a new component is identical to that of an old one, if the new component is part of a project that will fundamentally change the production process at an existing stationary source, this would be beyond the scope of a "like-kind replacement." Under either of those circumstances, it would be unreasonable to rely on premodification usage patterns to estimate future levels of capacity utilization. Instead, in such cases, EPA believes that it is reasonable to assume that in the absence of federally-enforceable limits on hours of operation or production rates, the new components may result in a substantial increase over historical levels of utilization of the emissions unit following modification [see *Puerto Rican Cement*, *supra*, 889 F.2d at 297 ("a firm's decision to introduce new, more efficient machinery may lead the firm to decide to increase the level of production")] and will compare pre-modification actual emissions to post-modification potential emissions. In addition to this circumstance, there are cases in which sources that undergo changes that qualify as add-on control systems would, under certain circumstances, be exempt from new source review. *See* Letter to Timothy J. Method, Assistant Commissioner, Indiana Department of Environmental Management, from David Kee, EPA Region V, January 30, 1990.

III. THE AGENCY'S RESPONSE TO THE COURT'S REMAND ORDER

A. The PSD Baseline Emissions.

Determining the "baseline" level of actual emissions before a physical or operational change is a necessary first step to determine if emissions increase as a result of the physical change. The Agency's regulations define the baseline for PSD purposes, as follows:

> In general, actual emissions as of a particular date shall equal the average rate, in tons-per-year (tpy), at which the unit actually emitted the pollutant during a 2-year period which precedes the particular date and *which is representative of normal source operation.* The Administrator *shall* allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period [see 40 CFR 52.21(b)(21)(ii)].

The purpose of the definition is to establish a baseline that is "representative" of "normal" source operations prior to the change. The Agency historically has followed a presumption that the most recent 2 years should be used, but has allowed another period where the source demonstrates that recent operations are abnormal [see 40 CFR 52.21(b)(21)(ii); see also 45 FR 52676, 52718 (1980)]. The WEPCO baseline period is an example of this. In this instance, plant utilization was disrupted by physical problems that led to nonroutine physical changes to remedy those problems. Consequently, EPA determined that a period prior to the onset of such problems was representative of normal operations, and as required by its

regulations, used this period to establish the baseline. The period used was also within the contemporaneous period specified in 40 CFR 52.21(b)(3)(ii). It should be emphasized that, in the WEPCO case, the parties and the court agreed that 1983-84 (prior to discovery of steam drum cracks) should be the baseline years (slip op. at 26); these years had an average 29 percent utilization rate. We continue to believe this is the appropriate baseline period for the Port Washington renovation.

B. Calculating Post-Change Emissions Under PSD.

The court concluded that "EPA's reliance on an assumed continuous operation as a basis for finding an emissions increase is not properly supported" (slip op. at 30). Although the court held that EPA cannot, in this case, wholly disregard past operating conditions at the plant, it also held that EPA could not reasonably rely on the company's own unenforceable projection of operating conditions (slip op at 29). The court remanded the question of PSD applicability to EPA for further proceedings not inconsistent with its decision.

Before the court remanded EPA's determination, it attempted to ascertain whether, in fact, the proposed project would be a major modification even using the assumptions least likely to result in an emissions increase. The court felt (and we agree) that such a "best" case scenario for WEPCO would assume that the "present hours and conditions" would not change at all following the renovations (despite, of course, WEPCO's own estimates of at least tripling of utilization over current levels) (slip op. at 31, n. 14). The court, however, lacked the data to make this calculation, as it could not determine whether

a major modification would result using a set of assumptions most favorable to WEPCO. Therefore, the court remanded the determination to EPA for further consideration.

A conceivable interpretation of the court's opinion is that EPA *must* calculate WEPCO's post-modification emissions increases based on "present hours and conditions." However, for the reasons discussed below, EPA believes that this interpretation is incorrect. Under such an interpretation, EPA would determineWEPCO's post-renovation annual emissions in tons per year (tpy) by simply projecting into the future the hours of operation and conditions (i.e., hourly emissions rate) that existed just before the renovations. This is the interpretation urged by WEPCO in a February 9, 1990 letter to EPA. Such a calculus will always result in exactly the same level of emissions before and after the physical change, and thus would always exempt "like-kind replacements" from PSD review. In addition, calculating emissions increases using this assumption would flatly contradict the record in this case. The WEPCO has stated that it will greatly increase capacity utilization over both current levels and the baseline levels used in the previous determinations. Capacity utilization in terms of heat input to the plant (based on nameplate capacity) during 1978-1979 was about 40 percent (Record item 7.4, WEPCO Submission, April 19, 1988 meeting with EPA). During the 1983-1984 baseline period, it was approximately 27 percent. *Id.* It has since declined to less than 10 percent (1988-1989 data). *Id.* The WEPCO has advised the State of Wisconsin that it intends to return to a forecasted 42 percent utilization level in the years following renovation with an upper maximum forecast of 50 percent [Letter from Walter

Woelfle, WEPCO, to Dale Zeige, Wisconsin Department of Natural Resources, March 29, 1990, Table 7 (enclosed)]. It would be wrong to assume that unit 5 would not be operated at all in the future when an explicit purpose of the renovation is to bring the unit back on line at its original design capacity; moreover, unit 5 is presently inoperative. Most importantly, this methodology is not fairly discernible from any reading of the current regulations. In addition, using "present hours and conditions" would disregard planned changes at WEPCO that will affect the post-renovation hourly emissions rate [e.g., increased capacity, lowering of sulfur content, and enhancement of the electrostatic precipitators (ESP)].

The court upheld EPA's position that increased utilization in the future that is linked to construction or modification activity should not be excluded in determining post-renovation emissions. Nevertheless, the court told EPA not to automatically assume 100 percent utilization in the future when historical data are available. The WEPCO has definite plans to return the plant to historical levels of utuilization that are well above baseline levels of utilization, and which could not be physically or economically attained but for the renovation project. Accordingly, EPA believes it is consistent with the court decision for EPA to base its remand decision on these facts and not rely on the present hours and conditions as conclusive of post-renovation emissions. After a thorough review of the possibilities, EPA has concluded that the court intended that estimates of future emissions for WEPCO's "like-kind replacements" should *consider* historic pre-renovation operating hours and production rates, as well as other relevant factors, in estimating future utilization levels, and should also consider the increased capacity, switching

to lower-sulfur fuel, and other changes affecting the hourly emissions rate for PSD purposes. Consequently, for WEPCO's "like-kind replacements," EPA will compare representative actual emissions for the baseline period to estimated future actual emissions based on all the available facts in the record. Specifically, in calculating post-renovation actual emissions, this approach takes into account 1) physical changes and operational restrictions that would affect the hourly emissions rate following the renovation, 2) WEPCO's pre-renovation capacity utilization, and 3) factors affecting WEPCO's likely post-renovation capacity utilization.

To quantify WEPCO's estimated future actual emissions after the proposed changes EPA relied heavily on projected and historical operational data (e.g., fuel consumption, MMBTU consumed) representative of the source. Specifically, the Agency considered available information regarding (1) projected post-change capacity utilization filed with public utility commissions; (2) Federal and State regulatory filings; (3) the source's own representations; and (4) the source's historical operating data. As described below, EPA determined an appropriate utilization factor for future operations and combined this with post-change emissions factors (to the extent they are or will be made federally enforceable) to estimate a future level of annual emissions for the purpose of determining whether the proposed physical and operational changes would be considered a major modification for PSD purposes. Where a significant emissions increase is projected to occur, WEPCO could voluntarily agree to federally-enforceable limits on any aspect of its future operation (including physical capacity and hours of operation) to ensure that no significant emissions increase will occur.

IV. THE AGENCY'S REVISED PSD APPLICABILITY DETERMINATION

A. Estimated Future Actual Emissions.

The Agency has revised its October 14, 1989 PSD applicability determination for WEPCO's proposed Port Washington renovation based on a "representative actual" to "estimated future actual emissions" comparison (as outlined above). As previously discussed, estimated future actual emissions projections take into account the likelihood that the plant will operate in the future as it has in the past.

The stated purpose of WEPCO's renovations is to refurbish the power plant units to an "as-new" condition in terms of their capacity, efficiency, and availability. Consequently, EPA has used actual, historical, operational data representative of the planet's past operations, approximating an "as-new" configuration, to calculate "estimated future actual emissions." The Agency has verified these data by comparison to WEPCO's own projections of post-renovation capacity utilization and industry averages.

As to the emissions factors used to calculate future emissions, EPA has used WEPCO's own emissions factors for future hourly emissions rates. These emissions factors are based on WEPCO's own assumptions regarding future sulfur in fuel and control technology performance levels. However, since these assumptions go beyond current State implementation plan (SIP) requirements, they must be made federally enforceable for EPA to continue to consider them for PSD applicability purposes.

Operational data (i.e., heat input) from the years 1978-1979 show a capacity utilization factor of 42 percent. These data points represent the closest projection of

WEPCO's operational characteristics, approximating an "as-new" state, as currently available to EPA. The data currently available to us regarding WEPCO's past operational levels are limited to a 10-year period. The Agency believes that these historical levels of operation are representative of the plant's past operations in an "as-new" condition. In addition, the 1978-79 data points appear consistent with WEPCO's own projection of future operations for the year 2010 (as submitted to the Wisconsin Department of Natural Resources on March 29, 1990) and common capacity levels for the utility industry, in general, for new units. However, by this letter, EPA is requesting that WEPCO submit operational data from previous years (i.e., pre-1978), if such data show heat input levels notably higher than the 1978-1979 levels.

As previously mentioned, to calculate future emissions levels for each pollutant, EPA assumed that the amount of future coal consumed in terms of heat input to the plant would be comparable to WEPCO's annual average 1978-1979 coal-consumption figure. On March 29, 1990, WEPCO submitted to the Wisconsin Department of Natural Resources information which contained estimates of future emissions for different levels of coal and heat input to the plant. The Agency used these estimates to establish future emissions based on 1978-1979 heat-input values. Again, it is important to note tht EPA's calculation of "estimated future actual emissions" is based on WEPCO's projection of control technology performance levels and/or fuel sulfur content for post-renovation operations. Consequently, EPA's PSD applicability determination is valid only to the extent that the emissions factors (based on control technology performance levels and sulfur in fuel) used to calculate future emissions are

made federally enforceable. Otherwise, the calculation of estimated future actual emissions for each pollutant will need to be revised by EPA based on existing federally-enforceable limits (i.e., applicable SIP, NSPS). The use of current, federally-enforceable emissions in the current SIP would result in higher projected future emissions than assumed in EPA's calculations and, consequently, could affect the indicated PSD applicability finding.

B. Revised Finding

In sum, EPA has considered past operations at WEPCO's Port Washington plant in estimating future actual emissions. Specifically, EPA has relied on the 42 percent utilization level (in terms of heat input) during 1978-1979. The Agency believes this is a reliable indicator of future utilization because it is consistent both with WEPCO's own projections of post-renovation operations and typical industry usage. The Agency has also considered post-renovation emissions rates on the assumption that they will be made federally enforceable. Compared to the 1983-1984 baseline period, those hourly rates are lower for SO_2 and PM, and unchanged for NOx. The 42 percent estimated post renovation capacity utilization is substantially higher than the 29 percent utilization level during the baseline period. However, in calculating total annual actual emissions, that increased usage is offset for SO_2 and PM by the decreased hourly emissions rates resulting from improvements to control systems and the use of low sulfur coal. Consequently, WEPCO is not subject to PSD review for those pollutants.

In the case of NOx, there will be a direct correlation between increased utilization resulting from the renovations

and increased actual emissions. Hence, WEPCO is subject to review for that pollutant and must obtain a PSD permit. The company should contact the Wisconsin Department of Natural Resources regarding the processing of a permit application for NOx. Due to insufficient source-specific information regarding emissions factors, PSD applicability for PM-10, lead, and noncriteria pollutants listed at 40 CFR 52.21 (b)(23)(i) and (ii) cannot be determined at this time. The PSD applicability for these pollutants should also be based on the "actual-to-actual" emissions test described herein.

This PSD applicability determination applies to WEPCO's currently planned renovations to units 1-5 (see Enclosure A), or, if WEPCO no longer wishes to proceed with renovating unit 5, only the renovation of units 1-4 (see Enclosure B). However, a decision to cancel the currently planned renovations to unit 5 could result in a PSD review for that unit should WEPCO reconsider renovating it some time in the future.

It is our understanding that WEPCO proposes to avoid triggering NSPS for SO_2 and PM at units 1 and 4 by using dry sorbent injection and improving the existing ESP's to offset the potential emissions increases of these pollutants. To the extent that the controls are federally enforceable, and no increase in hourly emissions would occur at maximum capacity, WEPCO can use these options to avoid triggering NSPS for PM and SO_2 at units 1 and 4. However, the two units are still subject to the NSPS requirements for NOx. Unit 5 cannot, however, avoid triggering NSPS for any pollutant and, therefore, is subject to the NSPS requirements for NOx, SO_2, and PM.

Sincerely,

/s/ William G. Rosenberg
William G. Rosenberg
Assistant Administrator
for Air and Radiation

3 Enclosures

Table 7 03/29/90

PORT WASHINGTON
POWER PLANT
MAY 1989 FORECAST
Units 1-5

YEAR	MEGAWATT HOURS GENERATED	CAPACITY FACTOR	FUEL CONSUMPTION COAL (13200 Btu/lb) BURNED TONS
1995	825,288	0.24	365,548
1996	941,779	0.27	415,332
1997	1,081,002	0.31	475,624
1998	1,114,313	0.32	490,868
1999	1,247,296	0.36	546,546
2000	1,349,329	0.38	589,569
2001	1,391,882	0.40	608,621
2002	1,481,464	0.42	646,617
2003	1,420,120	0.41	620,153
2004	1,432,122	0.41	625,174
2005	1,431,412	0.41	624,904
2006	1,460,471	0.42	637,519
2007	1,488,124	0.42	649,133
2008	1,481,423	0.42	646,909
2009	1,463,981	0.42	638,750

PORT WASHINGTON
POWER PLANT
UPPER MAXIMUM FORECAST
Units 1-5

YEAR	MEGAWATT HOURS GENERATED	CAPACITY FACTOR	FUEL CONSUMPTION COAL (13200 Btu/lb) BURNED TONS
1995	1,074,957	0.31	473,981
1996	1,202,460	0.34	528,838
1997	1,341,074	0.38	587,412
1998	1,390,470	0.40	609,237
1999	1,501,584	0.43	654,718
2000	1,600,500	0.46	696,483
2001	1,651,930	0.47	718,252
2002	1,748,046	0.50	760,000
2003	1,690,000	0.48	735,000
2004	1,690,000	0.48	734,000
2005	1,690,000	0.48	734,000
2006	1,710,000	0.49	741,000
2007	1,720,000	0.49	748,000
2008	1,720,000	0.49	747,000
2009	1,695,000	0.48	737,000

Enclosure A

Revised PSO Applicability Determination
Port Washington Power Plant Renovation of Units 1-5

(all emissions calculations are in tons per year)

Pollutant	Actual Emissions Baseline (1)	Estimated Future Actual Emissions (2)	Net Emissions Change	PSD Significance Level	Subject to PSD Review (3)
Particulate matter (4) (5)	328	323	-5	25	no
Sulfur dioxide (4)	24,236	15,919	-8,317	40	no
Nitrogen oxides (5)	2,592	3,405	813	40	yes
Carbon monoxide	144	217	73	100	no
Hydrocarbon	17	25	9	40	no

Other Regulated Pollutants: Due to insufficient source-specific information regarding emission factors, PSD applicability for PM-10, lead and noncriteria pollutants listed at 40 CFR Section 52.21 (b)(23)(i) and (ii) cannot be determined at this time.

1) Average actual emissions for 2-year period defined by calendar years 1983 and 1984.

2) Calculated by EPA based on the following information submitted by WEPCO.

a. The average historic firing rate (approximately 17×10^6 per year) for the 2-year period defined by calendar years 1978 and 1979.

b. The emissions estimates for the renovated units based on future coal characteristics (e.g., sulfur and heat content) and actual emissions after pollution controls for particulate.

c. Sulfur dioxide controls applied to units 5 at 75 percent sulfur dioxide removal to comply with NSPS Subpart No. Sulfur dioxide removal of 22 and 13 percent at units 1 and 4, respectively, to exclude these units from NSPS requirements for greater control of sulfur dioxide.

3) If new data indicate that annual, historic-firing rates at the Port Washington facility exceeded historic 1978 and 1979 levels, the indicated applicability determination could change.

4) The calculation of estimated, future, actual emissions for this pollutant is based on WEPCO's projection of annual technology performance levels and/or fuel sulfur content for post-renovation operations. Consequently, EPA's PSD applicability determination is valid only to the extent that the specific particulate and sulfur dioxide emissions factors used for units I-5 to calculate future emissions (based on particulate and 50, control technology performance levels and fuel sulfur and heat content) are made federally enforceable. Otherwise, the calculation of estimated, future, actual emissions for this pollutant will

be revised by EPA, based on existing federally-enforceable limits (i.e., applicable SIP, NSPS). The use of current, federally-enforceable emissions factors would result in higher, projected, future emissions and, consequently, could affect the indicated PSD applicability finding.

5) Baseline emissions (actual emissions for 2-year period defined by calendar years 1983 and 1984) have been revised based on additional information submitted by WEPCO.

Enclosure B

Revised PSD Applicability Determination
Port Washington Power Plant Renovation of Units 1-4

(all emissions calculations are in tons per year)

Pollutant	Actual Emissions Baseline (1)	Estimated Future Actual Emissions (2)	Net Emissions Change	PSD Significance Level	Subject to PSD Review (3)
Particulate matter (4) (5)	328	339	11	25	no
Sulfur dioxide (4)	24,236	18,505	-5,731	40	no
Nitrogen oxides (5)	2,592	3,396	804	40	yes
Carbon monoxide	144	217			
Hydrocarbon	17	25			

73	100	no
9	40	no

Other Regulated Pollutants: Due to insufficient source specific information regarding emission factors, PSD applicability for PM-10, lead and noncriteria pollutants listed at 40 CFR Section 52.21 (b)(23)(i) and (ii) cannot be determined at this time.

1) Average actual emissions for 2-year period defined by calendar years 1983 and 1984.

2) Calculated by EPA based on the following information submitted by WEPCO:

a. The average, historic-firing rate (approximately 17 x 10^6 per year) for the 2-year period defined by calendar years 1978 and 1979.

b. The emissions estimates for the renovated units based on future coal characterization (e.g., sulfur and heat content) and actual emissions after pollution controls for particulate.

c. Unit 5 inoperative. Sulfur dioxide removal of 22 and 13 percent at units 1 and 4, respectively, to exclude these units from NSPS requirements for greater control of sulfur dioxide.

3) If new data indicate that annual, historic-firing rates at the Port Washington facility exceeded historic 1978 and 1979 levels, the indicated applicability determination could change.

4) The calculation of estimated, future, actual emissions for this pollutant is based on WEPCO's projection of control technology performance levels and/or fuel sulfur content for port renovation operations. Consequently, EPA's PSD applicability determination is valid only to the extent that the specific particulate and sulfur dioxide emission factors used for units 1-4 to calculate future emissions (based on particulate and SO_2 control technology performance levels and fuel sulfur and heat content) are made federally-enforceable. Otherwise, the calculation of estimated, future, actual emissions for this pollutant will be revised by EPA, based on existing federally-enforceable limits (i.e., applicable SIP, NSPS). The use of current, federally-enforceable emissions factors would result in higher, projected, future emissions and, consequently, could affect the indicated PSD applicability finding.

5) Baseline emissions (actual emissions for 2-year period defined by calendar years 1983 and 1984) have been revised based on additional information submitted by WEPCO.

EXHIBIT 35

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 88-3264
89-1339

WISCONSIN ELECTRIC POWER COMPANY,

Petitioner,

v.

WILLIAM K. REILLY, Administrator
United States Environmental
Protection Agency, *et al.*,

Respondents.

ON PETITIONS TO REVIEW FINAL ACTION
OF THE UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

AFFIDAVIT IN SUPPORT OF RESPONDENTS'
MOTION FOR EXTENSION OF TIME

AFFIDAVIT OF GREGORY B. FOOTE

1. My name is Gregory B. Foote. I am a staff attorney in the Office of General Counsel at the U.S. Environmental Protection Agency ("EPA") in Washington, D.C. I have held this position since 1985. In this capacity I have primary responsibility within the Office of General Counsel

for advising and representing EPA in matters involving the prevention of significant deterioration ("PED") provisions of the Clean Air Act, 42 U.S.C. §7470-7479.

2. This affidavit is filed in support of Respondents' Motion For Extension of Time.

3. I am assigned primary responsibility in the above captioned case.

4. EPA and the United States Department of Justice presently intend to file a Petition for Rehearing in connection with the decision issued by this Court on January 19, 1990.

5. The matter under review is so complex that an adequate brief in support of the Petition for Rehearing cannot reasonably be prepared during the fourteen-day period allowed under Circuit Rule 40(d) for the following reasons:

(a) The Court's decision of January 19, 1990 largely upheld EPA's applicability determinations ruling that an extensive renovation project at the Port Washington power plant owned and operated by petitioner Wisconsin Electric Co. ("WEPCO") would be subject to new source requirements under the Clean Air Act, 42 U.S.C. § 7401, *et seq.* However, the court vacated EPA's determination that the calculation of future increases in "actual emissions" for purposes of determining applicability of the PSD provisions of the Act should be made using the "potential to emit" concept in 40 C.F.R. § 52.21(b)(21)(iv). Slip op. at 28-31. The Court also rejected WEPCO's proffered view that emissions increases following the renovations should be calculated based on the company's own unenforceable estimates of emissions. *Id.* at 29. The Court remanded the

PSD applicability determination to EPA for further proceedings not inconsistent with its opinion. *Id.* at 33. The Court further appeared to suggest that EPA could, on remand, calculate future emissions based on "whether the renovated plant would cause a significant net emissions increase if it were operated under present hours and conditions." *Id.* at 31 n. 14.

(b) EPA has tentatively concluded that the analysis employed by the court in deciding to vacate EPA's PSD applicability determination is faulty, and for this reason, EPA presently intends to file a petition for rehearing in which it will ask the Court to reinstate EPA's applicability determination. In addition, EPA presently expects that its petition for rehearing will, in the alternative, seek clarification of the Court's January 19 decision. However, as explained in paragraph (c) below, EPA at present is unclear as to the meaning or impact of the Court's decision.

(c) EPA staff are actively engaged in reviewing the Court's decision, including the suggestion on page 31 n. 14 for EPA action on remand. At this juncture, it appears that the Court's suggestion may not comport with any known method of calculating emissions increases under EPA's regulations. Consequently, EPA has not yet come to any conclusion as to the meaning or impact of the Court's decision on either the WEPCO project or the many other similarly situated sources which may be affected by that decision. I anticipate that several days of review and analysis will be necessary before EPA staff are able to present to EPA management their views as to the meaning and impact of this decision on the exceedingly complex PSD program. Only at that point will EPA be in a position to determine whether further clarification of the Court's

decision is appropriate and, if so, what clarifying order would be sought.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 26th day of January 1990 at Washington, D.C.

/s/ Gregory B. Foote
Gregory B. Foote

EXHIBIT 36

PROCEEDINGS OF THE ACID RAIN CONFERENCE

Springfield, Virginia

April 8-9,1980

Prepared by:

Office of Air Quality Planning and Standards
Research Triangle Park, North Carolina 27711

August 1980

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Dr. Gage: Ladies and Gentlemen, I would like to call this session to order. I am Steve Gage the Assistant Administrator for Research and Development. I am very pleased to welcome you here to this historic meeting on acid rain. During the next two days, we hope that all of us will gain a much better insight into the acid rain problem and learn more about what can be done to lessen its impacts.

As many of you are aware, this meeting follows, by less than a month, an important scientific meeting which was held in Norway. From that meeting we know that our state-of-the-knowledge remains incomplete, but that our state-of-the-knowledge is indeed changing very rapidly. There are now hundreds of scientists in Sweden, Norway, Canada, England, Germany, the United States, and other countries working on this problem. I am convinced that during the next few years we will see a dramatic advance in our understanding of the acid rain problem. I am also convinced from what we have learned, that the problem we will be discussing for the next twenty-four hours is not just a passing fad – it will occupy our attention well beyond this day and probably for most of the decade of the 1980s.

The impacts of acid precipitation affect wide geographical areas in virtually the entire aquatic and terrestrial ecosystem. Acid rain has the potential to cause severe

economic damages which can only become more costly should we delay in recognizing its full scope. Most importantly, it is not clear, at this time, whether the impacts of acid rain are, for all practical purposes, reversible. So it is very important that we begin today to establish a dialogue about this problem, and I invite you to join with us in seeking the best approaches for its solution.

* * *

As a practical matter, the only way to reduce acid deposition is to reduce the emissions of sulfur and nitrogen oxides, the pollutants that cause the problem. Among the major sources of these pollutants are utilites and power plants. Last year we set emission standards for new power plants which will prevent them from contributing significantly to the problem of acid deposition, however, there are hundreds of older plants that are either uncontrolled or poorly controlled. Any effective plan to reduce acid deposition will of necessity require reducing emissions from these older plants.

As the Nation backs away from oil and returns to coal for its energy needs, reducing total regional emissions will not be easy but it can be done. I wholeheartedly support coal conversion, it is essential that this Nation reduce its dependence on imported oil. I strongly believe, and have consistently stated publicly, that we can switch to coal and at the same time protect against environmental degradation. As we do so, we must realize that the distribution of coal reserves in this country precludes us from relying simply on low sulfur coal. The welfare of our miners and the economies of our Eastern and Midwestern coal-producing States require that we find ways to use all our

coal. The new source performance standards for coal fired power plants allows for just that.

I know many of you are also concerned with the economic effects of being down wind of interstate transport of air pollutants. In reality all States import and export air pollution. When one State is forced to clamp down on sources within its borders to compensate for pollution coming from a neighboring State, its industry unfairly may bear an

* * *

Moving to another possibility, and that is the definition of modification or reconstruction. It may be possible to modify the definition so that activities at a plant which tend to extend the useful life of that plant or tend to increase the total emissions generated over the total life of that plant could be legally defined as a reconstruction or modification which would, if those activities were undertaken, then cause the plant to be governed by the new source performance standards. Now, the positive aspect of that is that some of our current existing sources which are subject to relatively high emission limits, if they were to extend their useful life substantially, might be brought into the new source performance standards system. That regulatory requirement might cause one of two effects, it might cause a retirement of that facility rather than an extension of its life, or it might cause the retrofit of a source in order to meet the new source performance standard emission limit. The negative side is that there would likely be litigation over any modification of our definition, enforcement might be difficult, the activities that tend to extend useful life are largely a function of what the utility or other source is saying about the effects

of those modifications. It might be fairly easy to get into arguments with the sources about these particular physical changes and whether they would have the effect of extending the useful life. If we define the cutpoints, the type of activity that shifts you from one gain to the other too strictly, then you you could wind up imposing some very costly retrofits.

Well there are a number of other items which I would like to identify; that are things that the States may be able to do under their current legal authority, at least some States certainly can do some of these

* * *

EXHIBIT 37

ACID RAIN AND NONATTAINMENT ISSUES

HEARING

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENTAL PROTECTION

OF THE

COMMITTEE ON
ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

TO HEAR FROM HON. LEE THOMAS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY ON THE SUBJECT OF ACID RAIN AND NONATTAINMENT ISSUES

APRIL 22, 1987

Printed for the use of the Committee on
Environment and Public Works

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Senator BURDICK. Mr. Thomas, side-by-side comparisons of emission reductions by the United States and Canada are difficult because of differences in governmental forms and regulatory regimes. I understand that the eastern provinces of Canada, in an effort to reduce acid rain, have committed themselves to a 50 percent reduction in emissions by 1994. Do you understand that to be correct?

Mr. THOMAS. They have, Senator. They're in the process now of moving forward with implementation. That commitment was made a couple of years ago. They've still got a couple of provinces that have not yet implemented that commitment, but they're moving forward with that kind of commitment.

Senator BURDICK. I discovered something else recently, that as you move farther west in Canada through the provinces, that percentages go down. I understand that in Saskatchewan it isn't 50 percent, it's 25 percent, and it feathers out until you hit the Pacific coast. Is that correct?

Mr. THOMAS. Senator, let me say first, we are in the process of reviewing with Canada how they are implementing their control program. We are doing that because of our interest in learning more about how they're implementing it. We're also doing it in response to detailed questions we've received from the House Energy and Commerce Committee.

The Canadians have a different approach than we do. They don't have the strong Federal standard-setting authority that I have, for instance. That is largely an authority that the provinces have, so they work through an arrangement with the provinces to implement their

standard-setting process. They don't have the 15-year reduction history we've got from strong Federal standards on sulphur dioxide, as an example.

Now, within that they also have different ways of looking at, what do you consider a violation? Is a violation the kind of violation that we've got, or do you accommodate violations by production cutbacks as far as plant operations are concerned? So is it an ambient violation close to the plant that we're controlling, or is it an overall loadings violation that may be controlled through a production cutback over a year's period of time?

Looking at those issues and working with the Canadians to find out more about how they control their emissions is one of the things we're doing right now. I must say, though, that the kind of commitment that the Canadians made two years ago, that they're working through to implement, I commend them for. My friend, Tom McMillan, who is the Environment Minister in Canada, and I have had numerous discussions about the difficulty of implementing that and the difficulty that we have in the United States of implementing our control programs, and we're working closely to understand exactly how each of us implements our laws.

Senator BURDICK. Well, I'm asking this question because, after all, thin matter of air pollution is continental. It isn't only the United States; it's a continental matter. We are well aware that Canada doesn't have scrubbers on any of their powerplants. We understand that. They are trying to use clean coal technology and so forth, they talk about a 50 percent reduction, and as you go west they feather down to 25 percent and to nothing. I wonder if they're making a real effort, that's all.

Mr. THOMAS. There's a real question about that in a number of people's minds, and we're working that, issue.

Senator BURDICK. What is your opinion? Should any acid rain bill that we enact after 1987 require scrubbers in the midwest in the future?

Mr. THOMAS. Senator, first, I don't feel we're at a point where acid rain legislation should be enacted by Congress. I do not feel like a requirement for emissions reductions beyond those that we have ongoing under the Clean Air Act is evident today that would require acid rain controls.

Given that position, if you decide to move forward with an acid rain control bill, I feel that legislation should be one that looks at an approach that builds in flexibility. It's aimed at total loadings reductions, but it builds in the most cost-effective way to go about getting that, which in many cases, I think, will result in not having scrubbers. But I think that it will allow – should allow – the States to clearly interplay with their utilities in determining how those total loadings should be reduced. It should include emissions trading. It should include flexibility in making that decision between coal switching, new clean coal technology, or scrubbers. I do not feel that those things should be mandated.

Senator BURDICK. You don't think the future bill after 1987 should require scrubbers?

Mr. THOMAS. No, sir, I don't. I don't think you should have a mandated scrubber technology.

Senator BURDICK. Aren't we slipping backwards a bit?

Mr. THOMAS. No, sir. Under new sources – the issue on acid rain is, are you going to mandate scrubbers on existing

sources? All new sources in the United States, as you know, have scrubbers. We've got 150 of them with scrubbers now and 50 more on order, more than any other country in this world.

The issue is, are you going to go back and require retrofitting of your existing utilities? I don't think the concept of mandating retrofitting of scrubbers on existing utilities is the way to go at all.

Senator BURDICK. What do we do?

Mr. THOMAS. I think that if you decide to go forward, which I don't think you should do – if you decide to go forward and mandate additional reductions from those existing powerplants, I think you should build in the flexibility for the most cost-effective way to get those reductions, which includes the concept of switching fuels, the concept of new technology, the concept of scrubbers, the concept of conservation, all built in so that you have environmental and cost built in together in an effective way to get reductions in loadings.

Senator BURDICK. Well, I understand you, Mr. Thomas, but pardon me if I say it looks like we're retreating a bit if we're not going to be as firm as we have been in the past.

Mr. THOMAS. Retreating from what, Senator?

Senator BURDICK. Well, the requirement for scrubbers, for example.

Mr. THOMAS. But the requirement for scrubbers has always been on new sources.

Senator MITCHELL. Thank you, Senator Burdick.

Senator Chafee?

Senator CHAFEE. Thank you, Mr. Chairman.

Briefly – and I just want to get this quickly from you because I want to move on to something else – the problem we've got is that the new source performance standards obviously impose stiff requirements on new, sources, so therefore what's happening in our country is that we're not having new sources, that they are keeping the old plants going because there is less expense in so doing.

Many of us feel that we ought to be in a situation where we should be requiring the new source performance standards on the older plants because the theory was that the older plants eventually would expire, and then you would get new and more efficient plants – efficient as regards the release of pollutants. That's not happening.

What are you suggesting we ought to do? Why shouldn't we impose these new source performance standards on the old plants?

Mr. THOMAS. Well, first, Senator, I don't think you should impose them on the old plants because I don't think there's a scientific rationale for requiring that kind of emission reduction that you'd get from a new source performance standard, either as far as total loadings is concerned, as it relates to environmental damage, or the kind of specific definition that you would give to one location receiving damage from a particular plant. I don't think that there's a rationale for suggesting that you've got to have those new source standards on those old plants today or next year.

The problem you've got is as you stated. This country has decided not to go forward with the nuclear option,

which was one we were pursuing aggressively a number of years ago. A lot of the new sources, as far as utilities were concerned, were nuclear at that point in time.

We also, now, are looking at how we can go forward and extend the life of our existing sources. We have found through technology development a number of ways to do that cost-effectively, repowering ways, retrofitting ways to extend those lifetimes. So in fact, we have to deal with, is that going to be an environmental issue for us or a public health issue? I don't think it's going to be a public health issue; there's debate on that. I don't think it's going to be an environmental issue; there's debate on that. I may change my mind on that, but today I don't think you've got the basis to go in and suggest that all of those old sources should put on very stringent control requirements that we impose on the new source performance standards.

Senator CHAFEE. Well, Mr. Thomas, what's the problem here? Is it your belief that the current emissions in the United States are not causing enough damage to cause you to enact stronger restrictions than currently exist? I mean, no one knows more about the damage that has taken place in Europe. You've seen it. You've seen the lakes in Sweden. You've seen the forests in Switzerland and West Germany, and, in your mind, you just are not convinced that that damage is taking place in the United States. Is that the problem?

Mr. THOMAS. That damage, connected with the emissions levels that we've got in the United States? That's correct.

* * *

EXHIBIT 38

EXPERT REPORT OF
KENNETH SCHWEERS

DUKE ENERGY CORPORATION

AUGUST 15, 2002

/s/ Kenneth A. Schweers
Kenneth Schweers

I. INTRODUCTION

I am Kenneth Schweers, and I have just recently resigned as Chief Operating Officer of Development Alternatives, Inc. I have been asked by Duke Energy Corporation to provide an expert report in connection with this litigation. This report describes the assumptions made by the United States Environmental Protection Agency ("EPA") in the studies I did for the consulting firm ICF Incorporated on behalf of EPA evaluating the economic impact of environmental legislation and regulations, including EPA's New Source Performance Standards ("NSPS"), Prevention of Significant Deterioration ("PSD") and Non-Attainment New Source Review ("NNSR") regulations. I will refer to these regulations collectively as the "New Source Review" or "NSR" regulations or programs. In my opinion, from the mid-1970s through the 1980s, EPA believed the

- the focus of the NSR programs was to regulate emissions from new plants, not existing plants;
- the NSR requirements would not be triggered by existing coal-fired plants that operated at their original capacity and took actions necessary to maintain that capacity; and

- significant emissions reductions from existing coal-fired power plants would not be achieved through the application of the NSR programs and that new and additional legislative and regulatory programs were necessary to achieve reductions from existing plants, such as the "Acid Rain" regulations adopted in the Clean Air Act Amendments of 1990.

II. Summary of Qualifications and Preparation of this Report

I am an industrial and nuclear engineer and economic analyst by training. I received a Bachelor of Science in Industrial Engineering from Stanford University (1969). After graduation, I worked as a project manager for the U.S. Navy, where I assisted in directing the work of contractors in the design of reactor cores for submarines and heavy reactor equipment

* * *

The ICF studies used the aforementioned computer model that simulated the dynamics of the electric utility sector and the coal industry to estimate the economic and environmental impact of various legislative and regulatory proposals. The studies evaluated the economic impact by: (1) establishing a "base case" that assumed the pre-existing regulatory requirements with no new environmental requirements; (2) identifying the additional environmental requirements imposed by the legislative or regulatory proposals being evaluated; and (3) forecasting the incremental impact on the utility and energy producing sectors by adding the proposed environmental requirements to the pre-existing regulatory regime. The

assumptions used in the base case and the proposed requirements were either provided or approved by EPA.

NSPS Studies

In 1977 and 1978, ICF conducted economic impact studies under contract to EPA evaluating amendments to the NSPS regulations to implement the Clean Air Act Amendments of 1977. These studies, which I conducted, were designed to assist EPA in its review of proposed additions to the then existing NSPS regulations and to support its final rulemaking amending the NSPS.

The base cases for these studies incorporated various understandings and assumptions about how coal-fired plants were operating and being regulated. These understandings were either communicated by EPA to ICF, or suggested by ICF and approved by EPA. For the base case, EPA understood and assumed that existing plants were complying or would comply with then current Federal regulations (e.g., NSPS) and the State Implementation Plans (SIPs). We then modeled the potential impact of various alternative amended NSPS, each of which included its own set of understandings and assumptions that were approved by EPA. Both the base cases and the proposed alternatives shared a common understanding and assumption adopted by EPA: that existing coal-fired power plants would continue to operate at original capacity without being required to retrofit scrubbers.[1] EPA

[1] By "original capacity," I mean the design net dependable capacity that is available to the electrical power grid. This accounts for the energy needs of the plant itself to operate, and is different from what is often referred to as nameplate or gross capacity.

recognized that existing coal-fired power plants would be required to meet only the emission limits that had been established in the SIPs for existing plants.

The ICF analysis included estimates of operation & maintenance (O&M) costs. EPA did not direct ICF to assume that these O&M expenditures that allowed the plants to operate at their original capacity would trigger NSR requirements and the attendant cost of retrofitting pollution control equipment. Had EPA instructed ICF to assume that O&M expenditures would trigger NSR, ICF would have included such costs in the model's assumptions. For example, when modeling the costs of complying with SIPs, ICF evaluated the costs associated with SIP compliance options such as switching to low-sulfur coal or installing scrubbers. For purposes of the NSPS studies, EPA never asked ICF, however, to calculate what would have been the additional cost under NSR of retrofitting scrubbers to existing plants that operated within original capacity and were already in compliance with the SIPs.

The NSPS studies focused on the costs associated with designing and operating new facilities under a variety of regulatory scenarios. The impact of regulatory proposals on new plants could be accurately evaluated by relying on accepted engineering assumptions. The NSPS studies did not evaluate the costs of regulatory proposals on existing plants, which is a substantially different exercise that has to take into account a number of factors reflecting the range of financial, physical, technical and geographical constraints on existing plants. It was in the context of the acid rain initiative that EPA asked ICF to conduct economic evaluations of significant legislative or regulatory options for reducing emissions from existing plants.

Acid Rain Studies

After EPA promulgated the NSPS and PSD regulations in 1979-1980, ICF conducted a number of studies for EPA in the 1980s addressing the issue of acid rain. "Acid rain" is acidic precipitation resulting from accumulated atmospheric loadings of SO_2 and NOx. The ICF acid rain studies supported the efforts of various governmental agencies, including EPA, to evaluate regulatory and legislative proposals to reduce total SO_2 and NOx emissions, primarily from existing coal-fired power plants. While at ICF, I conducted or oversaw the conduct of these studies.

The "base cases" for these acid rain studies projected emissions based on the understanding that the then current environmental regulatory regime remained unchanged. EPA believed that SO_2 and NOx emissions from existing coal-fired power plants would be relatively constant under existing law. This assumption was based on plants operating at their original capacity at their allowable emissions level. EPA did not request ICF to study, whether under existing law, SO_2 emissions from existing coal-fired plants would decrease because of the application of NSR and the attendant retrofitting of pollution control equipment. EPA also did not direct ICF to assume that variations in actual operating or emissions levels, such as periodic decreases associated with maintenance followed by increases back to original capacity, would trigger NSR. In other words, EPA believed that existing coal-fired power plants would continue to operate without triggering NSR.

The focus of the acid rain proposals we evaluated on behalf of EPA and other government agencies was reducing

the SO_2 and NOx emissions from existing sources. EPA believed that new regulations and the legislative programs would be needed to achieve these reductions and that significant SO_2 and NOx reductions would not be achieved by retrofitting scrubbers or other pollution control equipment on existing plants through the application of NSR. EPA believed that SO_2 and NOx emissions at existing plants would remain relatively constant absent a change in environmental legislation or regulation. The emission-reduction options ICF evaluated in various acid rain studies conducted for EPA in the 1980s included, among numerous others:

- a 30% reduction of SO_2 and NOx emissions;
- a 2.0 lb./mmbtu SO_2 limit;
- a tax on utility emissions of $0.15 per pound of SO_2 emitted;
- the Waxman-Sikorski bill (H.R. 3400), which proposed a 9.5 million ton SO_2 reduction for existing utility plants;
- the Acid Deposition Control Act of 1986 (HR. 4567) which would require a 2.0 lb. SO_2/mmbtu limit, to be followed by a 1.2 limit; and
- an option EPA considered to require existing plants to meet NSPS when they reached 30 years of service.

At the direction of EPA. ICF evaluated these proposals against the base case assumption that existing law, including the NSR programs, would not require significant SO_2 and NOx emission reductions from existing plants operating at their original capacity.

Beginning in 1985, EPA believed that existing plants would operate for 60 years. EPA also understood that utilities would have to repair or replace components as required to continue to operate to this longer lifetime. ICF recognized that these costs occurred throughout the life of the plant and that it was not possible to establish precisely when these replacements or repairs had occurred (or would occur). For modeling and study reporting purposes, however, we assumed that these repairs or replacements would occur at 30 years of the plant's useful operating life and would be referred to as "refurbishment." This mid-life refurbishment was part of the maintenance that the ICF studies assumed would occur at existing coal-fired power plants to allow them to continue to operate at their original capacity and close to their design efficiency. The 1985 and subsequent studies ICF conducted on behalf of EPA all assumed, as EPA directed, that the O&M necessary to keep the plants operating, including the refurbishment at the 30-year mark, would not trigger NSR or scrubber retrofits for those existing plants.

I do not recall any discussion that I had with EPA about the assumptions in these models in which the Agency stated that mid-life refurbishments would trigger NSR and require the existing plants to retrofit scrubbers. Had it been EPA's view that the NSR programs, beginning in 1979-1980, would have achieved significant SO_2 reductions, ICF would have reflected that belief in the acid rain studies we conducted on EPA's behalf. EPA's understanding that NSR would not significantly reduce SO_2 emissions from existing coal-fired plants was further reflected in one of the regulatory proposals EPA asked ICF to evaluate. EPA was considering the automatic imposition of NSPS requirements on existing coal-fired power plants when

they reached the 30-year mark as an alternative regulatory approach to address acid rain. This EPA proposal demonstrates EPA's belief that existing plants would not be subject to widespread retrofitting of scrubbers absent a change in the law.

Most of the acid rain proposals we evaluated for EPA included the option for large-scale retrofitting of scrubbers at existing plants. ICF did not include the retrofitting analyses in the base case because EPA did not view the widespread installation of scrubbers on existing plants to be required under the existing CAA regulatory regime. To project the costs of retrofitting, we had to better understand the specific characteristics of the various types of existing plants. This is because, unlike projecting scrubber costs for new "greenfield" plants which can be estimated rather accurately in a generic manner based on engineering estimates, retrofit costs are dependent on a number of historical and site-specific factors. These factors include the type, location and capacity of the plant, the design of the plant (e.g., types of coal likely to be burned and whether the plant had physical space for scrubbers), and how the plant was intended to be used in the power grid. ICF did not include this type of site-specific analysis, which is necessary to understand retrofitting costs, in its studies for the NSPS rulemakings in 1978-1979, since those rule-makings focused on regulatory proposals applicable to new plants.

Our studies projected that a regulatory program that forced the retrofitting of scrubbers at existing power plants would be very expensive. For example, the study that evaluated the option considered by EPA to impose NSPS on coal-fired plants when they reached 30 years in age projected that by 1995, utilities would incur an incremental annual cost of $3.9 billion in 1985 dollars (this

would be $6.6 billion in 2002 dollars). By the year 2010 the incremental annual cost of retrofitting would increase to $9.4 billion in 1985 dollars (this would be $15.8 billion in 2002 dollars). This incremental annual cost of retrofitting scrubbers included the annual capital charge for the costs for additional equipment (e.g., the scrubbers themselves) installation, incremental increases in O&M costs and any additional fuel costs resulting from the use of additional pollution control equipment. EPA's option to impose NSPS on coal-fired plants when they reached 30 years in age would have required the utility industry to invest by 1995 about $29.8 billion in 1985 dollars (it would be $50 billion in 2002 dollars).

Overall, if EPA's proposal to impose NSPS on coal-fired plants at the 30-year point in their life had been adopted, the utility industry would have been required to invest approximately $69.5 billion between 1990 and 2010 in 1985 dollars (this would be approximately $117 billion in 2002 dollars). Further, these studies noted that there were other uncertainties and constraints associated with retrofitting that would have likely increased the projected costs above those reported in the ICF study. Though our model attempted to take site-specific constraints associated with plant design or location into account, it was able to do so only in the most general way.

* * *

EXHIBIT 40

1989 EPA BASE CASE FORECASTS

Prepared For

The U.S. Environmental Protection Agency

By

ICF Resources Incorporated

May 1989

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Appendix C Base Case Assumptions

INTRODUCTION

This report presents new EPA Base Reference Case forecasts through 2010 of future trends in utility air emissions, utility capacity and generation levels; utility fuel consumption, and regional coal production. These trends were recently re-examined in order to provide up-to-date bases from which economic and emissions impacts under alternative environmental control proposals can be assessed. Two Base Reference Case scenarios (referred to as the High and Low Emissions Cases) were analyzed to present a reasonable possible range of electric utility air emissions over the next two decades.

This report is organized into three sections with three appendices. The first section presents the forecasted trends from the two new EPA Base Cases, as well as a brief analysis of the factors underlying these trends. The second section presents these forecasts in comparison to the previous (1987) EPA Base Case forecasts. The final section presents some of the key assumptions and uncertainties that underlie these forecasts. Appendices A and B present forecasts from the High and Low Emissions Cases, respectively, while Appendix C presents a detailed list of the 1989 EPA Base Case assumptions.

In the High Emissions Case utility sulfur dioxide (SO_2) and nitrogen oxide (NO_x) emissions are forecasted to rise moderately from recent historical levels in the near-term with continued growth in the long-term. In the Low Emissions Case, emissions remain flat in the near term, grow slightly through 2000, but decline thereafter. Gas-fired capacity options (e.g., combined cycles and turbines) are expected to be chosen for most new, currently unplanned capacity requirements through 2000 in both cases, while a significant amount of new coal capacity is forecasted to come on-line after 2000. National utility gas consumption in the High Emissions Case is expected to rise only moderately from current levels while gas loses market share to oil in many existing utility steam plant markets. In contrast, in the Low Emissions Case, gas gains considerable market share from oil in the near-term. National coal production levels are forecasted to increase steadily, with most regions experiencing some growth from 1985 levels in both cases.

Many important assumptions underlie these forecasts. Several of these assumptions have been substantially revised since the 1987 EPA Base Case analysis (which was based on assumptions developed in late 1986), reflecting important changes in the energy markets. Some key assumptions were varied between the two reference cases to reveal the sensitivity of the emissions and fuel use forecasts to these factors. The most important of these assumptions are presented in the table on the following page.

In general, the assumptions used in the Low Case contribute to lower forecasted emissions growth than in the High Case. In particular:

- Lower electricity demand results in lower coal powerplant utilization.
- Shorter fossil steam powerplant lifetimes result in earlier retirements of higher-emitting existing coal units, which are

Assumption		1989 EPA Base: Reference Case High	Low
Crude Oil Prices (1988$/bbl)	1995	18.00	25.00
	2000	22.00	29.00
	2005	25.00	31.50
	2010	29.50	34.00
Electricity Demand Growth (% per year)	1988-2000	2.8	2.0
	2001-2010	2.3	1.4
Steam Powerplant Lifetimes (years)	Coal/Oil/Gas> 50Mw	65	55
	Coal/Oil/Gas> 50Mw	45	45
	Nuclear	35	40
Cogeneration (billions of kilowatt hours)	1995	175	195
	2000	208	291
	2005	255	382
	2010	313	474
New Non-Fossil Capacity (gigawatts)	2005	0	9
	2010	0	20
Repowered Coal Capacity* (gigawatts)	2000	0	4
	2005	6	20
	2010	10	38

New Unplanned Coal Powerplants Allowed By	2000	2005

* Includes 50% increase in capacity due to repowering.

generally replaced by new lower-emitting gas or scrubbed coal capacity.

- More repowering with clean coal technologies reduces SO_2 and NO_x emissions rates at repowered plants.
- More non-fossil capacity and cogeneration reduces the amount of higher-emitting coal-fired capacity operated and built.

A more detailed discussion of the assumptions, caveats, and uncertainties pertaining to this 1989 EPA Base Case analysis is presented in the final section of this report.

* * *

KEY ASSUMPTIONS

A number of assumptions have important effects on projections of future levels of utility emissions, utility generation and capacity, utility fuel consumption, and coal production. A short list of some of the key assumptions used in the two reference cases is shown on page 2, while a detailed list of the assumptions is presented in Appendix C. Several of the more important assumptions incorporated in this Base Case analysis, and their effects on the forecasts presented herein, are discussed below.

Oil and Gas Prices

Oil and gas prices have a very important effect on the amount of turbine/combined cycle versus coal capacity built. In turn, relative oil and gas prices affect the amount of gas versus oil consumption at existing oil/gas steam powerplants. Accordingly, the level of oil and gas prices have important effects on utility SO_2 emissions.

World oil prices are very uncertain because the world oil market is fundamentally unstable: the lowest cost producer (Saudi Arabia) is also the marginal producer (largely for political reasons). Therefore, it is difficult to define within a narrow range the full spectrum of potential future oil prices. However, future oil prices would be expected to range from levels near recent depressed levels of $17/bbl (reflecting continued market weakness) to moderately higher real prices as the current excess production capacity situation abates.

There is also uncertainty with respect to delivered natural gas prices. Recent ICF gas market assessments suggest that the current gas supply "bubble" will dissipate by around 1990. This is expected to lead to relatively significant increases in prices in the near term such that wellhead prices would be expected to be no lower than $2.60 per million Btu even assuming low oil prices. In the long-term, recent ICF analyses conducted for DOE suggest that gas resources available for production in North America (both in Canada and in the U.S.) are more plentiful than previously thought, and that advances in exploration and extraction techniques will expand the supply of low- to medium-cost gas reserves. Accordingly, wellhead prices increase more slowly in response to greater supplies in the $3 to $4 wellhead gas price range. However, the

trends in gas prices are strongly linked to future oil prices (since gas and oil are substitutes in many applications), and hence are also very uncertain.

Alternative oil and gas prices in the High and Low Cases were assumed to reflect these uncertainties. ICF's projections of oil and gas prices are based on a previous integrative assessment of demand and supply conducted for the DOE which suggested an amount of supply that would be available at given price levels. The specific price projections used in this base case analysis were not developed using a detailed supply/demand model, such an effort would be outside of the intended scope of this project.

In the High Case, lower oil prices were assumed over time, remaining at about $18/bbl through 1995, increasing moderately to reach $22/bb by 2000 and $29.50/bbl by 2010. Accordingly, delivered natural gas prices to utilities (on an average annual, interruptible basis), in New England rise from roughly $2.50/mmBtu recently to $4.10/mmBtu in 2000 and $4.95/mmBtu by 2010. As a result, gas prices are generally higher than most grades of residual oil in this case, thereby leading to relatively more oil consumption. In contrast, in the Low Case, world oil prices are forecasted to increase more rapidly over time, reaching $29/bbl by 2000 and $34/bbl by 2010. Although delivered gas prices are forecasted to be higher than in the High Case ($4.40/mmBtu in New England by 2000, and $5.15/mmBtu by 2010), gas prices are typically lower than competing residual oil prices, so that relatively more gas consumption results in this case. See Appendix C for average annual interruptible prices for gas delivered to utilities in the High and Low Cases as compared to regional residual oil prices.

Because of seasonal fluctuations in the demand for gas from residential and commercial customers, there tends to be relatively high delivered gas prices to utilities in the winter (about 10-20 percent above the annual average price in recent years) and lower delivered gas prices in the summer (about 10-20 percent below the annual average price). Electric utility consumption of gas is assumed to vary seasonally. In the High Case, with relatively low oil prices, gas was generally forecasted only to be consumed by electric utilities in the summer months in the Eastern states. In the Low Case, with relatively low gas prices as compared with oil, gas was generally forecasted to be consumed by utilities during all seasons except the winter months in the Eastern states.

In the West South Central region, gas was forecasted always to be competitive with oil in both the Low and High Cases, with electric utilities consuming all natural gas at oil/gas steam plants in Texas and Louisiana in all years. In California, due to stringent environmental regulations, only gas was assumed to be consumed at oil/gas steam plants.

Scrubber Costs

Lower scrubber costs were assumed in the new EPA Base Case analysis than were used in the 1987 EPA Base Case, reflecting technology improvements in the pollution control industry. These costs are roughly comparable to the lower industry scrubber costs used in a number of EPA acid rain control analyses conducted recently by ICF.[2] The

[2] See, for instance, *Analysis of the Mitchell Compromise Acid Rain Proposal*, September 1988.

new scrubber cost assumptions were based on EPRI/ Stearns-Rogers cost assumptions as interpreted by RCG/ Hagler, Bailly, Inc. (Several key assumptions were made: (1) a contingency factor of 15 percent was used, (2) one spare module was assumed, and (3) scrubbers were assumed to be designed with *no* reheat in contrast to assumptions in the 1987 EPA Base Case.) The cost assumptions for a new NSPS-Da powerplant resulting from this assessment are presented in Table 4.

The net effect of these assessments was that wet scrubbing was assumed to be employed at all unplanned new powerplants, because wet scrubbing cost estimates were lower than dry scrubbing costs estimates. Accordingly, the cost differences in scrubbing high and low sulfur coals were smaller than were assumed in the 1987 EPA Base Case. Furthermore, scrubbed units are forecasted to be higher utilities' dispatch order than in the 1987 EPA Base Case because of lower variable O&M costs associated with scrubbing, thereby increasing forecasted utilization levels somewhat. These effects led to stronger growth in high sulfur coal production than was forecasted in the 1987 EPA Base Case.

Sulfur Level	Lbs. SO_2/mmBtu:
Very Low Sulfur	Less than 0.80
Low Sulfur	0.80-1.08
Low-Medium Sulfur	1.09-1.66
Medium Sulfur	1.67-2.50
High-Medium Sulfur	2.51-3.33
High Sulfur	3.54-5.00
Very High Sulfur	More than 5.00

TABLE 4

WET SCRUBBER COSTS FOR NEW UTILITY POWERPLANTS MEETING NSPS SUBPART DA REGULATIONS

	Sulfur Level						
	Very Low	Low	Low Medium	Medium	High Medium	High	Very High
Capital Costs (early '86 $/kw)	108.00	110.00	110.00	124.00	133.00	145.00	154.00
Fixed O&M Costs (early '86 $/kw-yr)	4.92	4.98	5.00	5.45	5.74	6.11	6.39
Variable O&M Costs (early '86 mills/kwh)	0.25	0.32	0.46	0.69	0.92	1.36	1.80
Energy Penalty (%)	2.50	2.50	2.50	2.50	2.50	2.50	2.50
Capacity Penalty (%)	2.10	2.20	2.10	2.10	2.10	2.10	2.10
Reliability Penalty (%)	2.70	2.70	2.70	2.70	2.70	2.70	2.70
Annual Emissions Rate (lbs. SO_2/mmBtu)	0.22	0.29	0.48	0.48	0.48	0.60	0.80

Electricity Demand Growth

Electricity demand growth is forecasted to be much lower (1.7 percent per year from 1987 to 2010) in the Low Case than in the High Case (2.6 percent per year from 1987 to 2010). This has readily apparent ramifications upon the amount of utility generation required to meet electricity demands, the majority of which is provided by fossil fuels. Thus, higher electricity demand growth ultimately translates to higher utility emissions.

The national average growth rate assumptions incorporated in these reference cases were implemented at EPA's direction. Differential growth rates by region were based on recent NERC projections of future electricity growth in each NERC reliability council region, and then adjusted by RCG/Hagler, Bailly, Inc. to achieve the target national sales growth rate assumed by EPA. In the High Case, however, somewhat different near-term growth assumptions (i.e., through 1995) were used in the East North Central and the West South Central regions. In this case, higher near-term growth was assumed in the East North Central (2.9% per year from 1987 to 1995 instead of 2.5% per year) reflecting a continuation of recent historical growth trends (about 3.3% per year from 1986 to 1988) and consistent with strong economic growth and low oil prices assumed in this case. In contrast, low near-term growth was assumed in the West South Central (1.9% per year from 1987 to 1995 instead of 2.9% per year) reflecting a continuation of recent historical trends (only 2% per year from 1985 to 1988) and consistent with low oil prices and, hence, sluggish growth in this region in the near term.

Since ICF forecasts of future regional electricity demand growth were previously the underlying source for

the EPA demand forecasts, regional sales growth patterns in the 1989 EPA Base Case analysis are different than those used in the 1987 EPA Base Case.

Repowering

In contrast to the 1987 EPA Base Case, EPA assumed for this Base Case analysis that utilities would undertake a small to significant amount of repowering at certain existing coal-fired units. Repowering (using a "generic clean coal" technology) was assumed at EPA's direction to have much greater market penetration in the Low Case than in the High Case. Repowering candidates were assumed to include only those unscrubbed SIP coalunits greater than 75 megawatts and less than 400 megawatts, since current evidence suggests that repowering technologies may be uneconomic or technically infeasible at very small or very large units. Units were assumed to become part of the candidate pool upon reaching 35 years of age beginning in 2000 (with only units built before 1950 assumed to be too old to repower).

In the Low Case, it was assumed a total of one third of all such candidates would repower by 2010 with lower percentages (5 percent by 2000 and 20 percent by 2005) assumed in earlier years. In the High Case, much lower market penetration was assumed with only 10 percent of candidate units repowering by 2010 (5 percent by 2005 and no repowering in 2000).

In the assumed first year of repowering in both the High and Low Cases, units between 75 and 150 Mw and built before 1960 were generally selected for repowering. In later years, units up to 400 Mw and those built in the late 1960s and early 1970s were assumed to be selected for

repowering. Smaller units were assumed to be selected first because utilities would wish to develop their design and construction expertise in simpler, less expensive settings. Older units were selected first because they are generally smaller and because many utilities would tend to repower units as they reached the end of their useful lives (assuming no major refurbishment). Repowered units were selected regionally so as to roughly reflect the proportional distribution of available candidate capacity. (A list of selected repowered capacity by CEUM regions is included in Appendix C.) Future utility regional capacity requirements (as forecast in the two reference cases) were taken into account in selecting the repowered units. Capacity was only selected to the extent new capacity was needed in the region to meet reserve margin requirements.

Note that capacity affected by these repowering assumptions are in addition to those units which have already repowered (e.g., TVA's Shawnee 10, NSP's Black Dog 4, MDU's Heskett 2, Colorado-Ute's Nucla 4) or have firm plans to repower (AEP's Tidd and Sporn projects, SPS's Nichols 3). Together, these units total roughly 1 gigawatt of capacity, in contrast to about 38 gigawatts of repowered capacity that results by 2010 from the repowering assumptions of the Low Case.[3]

The assumed cost and performance characteristics of the repowering technology are discussed below, and are generally representative of a fluidized bed combustion (FBC) technology.

[3] In addition, other projects (using other emissions control technologies which do not increase capacity) that were approved for funding in DOE's Clean Coal Technology development program (through Round II) were also included in this Base Case analysis.

- *Capacity* at those units that were selected for repowering was assumed to increase by 50 percent upon repowering. DOE assumes that atmospheric FBC (AFBC) repowering would lead to a 15 percent increase in capacity, pressurized FBC (PFBC) repowering would lead to a 30-50 percent capacity increase, and integrated gasifier combined cycle (IGCC) repowering would lead to a 150 percent increase in capacity.[4] The 50 percent capacity increase assumption was thus chosen as a reasonable average capacity gain for repowering projects to reflect a "representative" repowering technology, weighted heavily towards FBC technology for a typical installation (given the current relatively advanced state of FBC development, demonstration, a economic refinement). This 50 percent average capacity gain assumption is in agreement with EPRI's current assumptions.

- A *heat rate* of 9500 Btu/kwh was assumed for all repowering projects. This is in rough accord with EPRI TAG estimates for the candidate repowering technologies (9000 Btu/kwh for PFBC and IGCC, 10000 Btu/kwh for AFBC).[5]

- *O&M cost* estimates for the generic repowering projects were also derived using EPRI TAG. information (see PFBC combined cycles). Assuming the use of a 4% sulfur bituminous

[4] *America's Clean Coal Commitment*. U.S. Department of Energy, Office of Fossil Energy, February 1987.

[5] *TAG – Technical Assessment Guide, Volume 1: Electricity Supply – 1986*. Electric Power Research Institute (EPRI p. 4463-SR), December 1986.

coal, fixed O&M costs were assumed to be $38.60/kw-ye, while variable O&M costs were assumed to equal 5.5 mills/kwh (costs in early 1986 $).

- A *minimum capacity,* (turndown) of 50 percent was assumed for repowered units also in line with EPRI's assessment of PFBC technology.
- Additionally, it was further assumed that repowering would not affect a unit's *availability* (forced and scheduled outage rates were assumed not to improve).
- *Emissions rates* were assumed to meet current NSPS requirements for SO_2 and TSP. NO_x rates from repowered projects were assumed to equal 0.3 lbs. NO_x per million Btu.

Note that the assumed level of repowering can significantly affect new utility capacity needs/decisions, regional coal production, and the level of SO_2 emissions (since repowered units have much lower SO_2 emissions rates).

New Unplanned Coal Capacity

No new unplanned coal capacity was assumed to be built until 2000 (High Case) or 2005 (Low Case) to reflect the difficulties and long lead times in planning/siting/building new coal plants. This assumption influences coal versus gas capacity and consumption levels, as well as coal production levels and SO_2 emissions forecasts.

Renewable and Non-Traditional Capacity and Generation

In the High Case, a small amount of planned renewable and non-traditional capacity was assumed to be added by 20 (about 5 gigawatts, with most being added in California). After 2000, in the High Case, no additional non-fossil capacity was assumed to be added. In contrast, in the Low Case, a significant quantity of new currently unplanned renewable and non-traditional capacity was assumed to be added by utilities after 2000. This was assumed to include such possibilities as advanced nuclear, wind, solar, and geothermal technologies. The amount of such capacity was assumed to be sufficient to meet approximately one-quarter of all assumed incremental electricity demand growth after 2000. The effects of this assumption are to reduce new fossil capacity requirements, lower fossil fuel consumption, and decrease utility SO_2 and NO_x emissions.

Cogeneration

The effects of the assumed higher cogeneration forecasts in the Low Case are similar to the effects of increased renewable and non-traditional capacity. The cogeneration assumptions used in the Low Case were developed by RCG/Hagler, Bailly, Inc. The High Case cogeneration assumptions were developed by ICF from recent assessments conducted in preparing the FERC Base Case.[6] Although the High Case cogeneration forecasts

[6] *Draft Environmental Impact Statement: Regulations Governing Independent Power Producers (RM88-4-000) and Regulations Governing Bidding Programs (RM88-5-000)*, Federal Energy Regulatory Commission,

(Continued on following page)

are lower than those used in the Low Case, both sets, of assumptions result in more cogeneration than assumed in the 1987 EPA Base Case. This results in less utility generation and, hence, lower emissions.

Powerplant Lifetimes

Powerplant lifetime assumptions also have significant effects upon forecasted SO_2 emissions. Shorter assumed fossil powerplant lifetimes serve to lower SO_2 emissions forecasts, since older high-emitting units would retire sooner (and be replaced by lower-emitting new capacity). Further, regional coal production patterns are potentially affected, since retiring low- or medium-sulfur coal units might be replaced by new scrubbed coal capacity using high sulfur coals. In contrast, longer assumed nuclear lifetimes would lower SO_2 emissions by delaying the need for fossil-fired replacement capacity.

The range of assumptions for large fossil plants (65 years assumed in the High Case, 55 years assumed in the Low Case) was specified by EPA. EPA in the past has used a 60 year lifetime assumption. Note that smaller units (under 50 megawatts) are assumed to retire sooner (after 45 years) to reflect generally unfavorable economies of scale in refurbishing low capacity units. The range of assumptions for nuclear plants (35 years in the High Case and 40 years in the Low Case) was also specified by EPA. Nuclear plants are granted a 40-year operating license upon issuance of their construction permit (for plants built prior to 1982) or upon issuance of their operating license

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Offices of the General Counsel, Office of Economic Policy, Office of Electric Power Regulation, June 1988.

(for plants built in 1982 or after). Thus, most pre-1982 plants would only have lifetimes of about 35 years or less from date of initial operation (because of the lag between licensing, construction, and final operation). However, the NRC has recently changed the terms in two cases such that the duration of the permit is from the date of initial operation, which would result, in an effective 40-year lifetime. Accordingly, the range of nuclear plant commercial lifetimes is most probably bounded by a low of 35 years and a high of 40 years.

Coal Mining Productivity

Coal mining productivity assumptions were revised for this Base Case analysis to reflect recent continued high productivity growth in the coal mining industry. For instance, gross labor productivity increased by about 7 percent per year between 1982 and 1987 at underground mining operations. While ICF views these high rates of productivity growth as a short-term phenomenon, the high rates of growth in the past few years (and expected in the near future) were newly incorporated into this Base Case analysis, and have important implications on coal prices: real coal prices (and sulfur premia) are lower in these reference cases than in the 1987 EPA Base Case. The net effect of higher assumed mining productivity is thus to make coal more economically attractive (by reducing the future trends in real coal prices) in new capacity decisions.

Emissions Rates and Limits

A recent review of SO_2 emissions rates at selected powerplant units around the country revealed that some units (including many unscrubbed NSPS Subpart D units

in the West) have historically emitted, and will likely continue to emit, at rates well below their required limits. Generally, this is because these units have access to ample supplies of inexpensive local coals, or have committed to contract purchases of coals, which have sulfur contents well below SIP or NSPS requirements, or have found that the variability of sulfur in coals requires a lower long-term average sulfur content. For the new Base Case analysis, these units were assumed to emit at rates in line with current coal deliveries

As a result of (1) the recent enactment, revisions to, or implementation of acid rain programs in certain states (Minnesota, Wisconsin, Massachusetts, New Hampshire, and New York), and (2) latest revisions in SIP limits due to stack height or local ambient air quality reviews (particularly in Indiana), several unit-specific, utility-specific, or statewide emissions limits were included for this new EPA Base Case analysis. These regulatory changes have occurred since the development of the 1987 Base Case in late 1986. No other changes in emissions limits were assumed by EPA. It was assumed by EPA that the recent WEPCo decision would not result in any significant number of powerplants having to comply with NSPS upon refurbishment.

Financial Parameters

Electric utility financial assumptions are presented below and were not varied under the two base cases. They differ slightly from the 1987 EPA Base Case with the real cost of capital somewhat higher but the real capital charge rate about the same. The major difference in the real cost of capital was the assumed cost of debt, preferred equity,

and common equity. These were raised to levels of 9.2 percent pre-tax cost of debt, 10 percent cost of preferred equity, and 13 percent cost of common equity (based on current nominal cost of debt and preferred equity for utilities) from previous assessments of 7.6, 7.9, and 12.8 percent respectively. Note that for future investments this cost of capital could be higher or lower although long term real cost of debt and equity have generally been much lower. EPRI assumes somewhat higher nominal cost of debt and equity which largely reflects a higher assumed inflation rate of 6 percent.

	Percent of Total Utility Capital	Pre-Tax Cost	After Tax Cost	Mixed Weighted Average Cost
Debt	50%	9.2%	5.61%	4.60
Preferred Equity	15%	16.39%	10.0%	1.50
Common Equity	35%	21.31%	13.0%	4.55
				10.65%

Nominal Discount Rate	10.65%
Real Discount Rate	5.38%
Inflation Rate	5.0%

Real Capital Charge Rates

30 Year Book Life: Coal/Nuclear/Scrubber/ Combined Cycle	9.4%
20 Year Book Life: Combustion Turbines	11.5%

Nuclear Capacity and Capacity Factors

Nuclear capacity was not assumed to vary between the two base cases. No new nuclear capacity beyond

currently planned units was assumed to be built by 2010 in the High Case. In the Low Case, as part of increased non-fossil generation assumptions, it was implicitly assumed that new nuclear plants could potentially be built *after* 2000. In both cases, in the near term, several important assumptions were made regarding the completion of delayed units: Seabrook will be at full power by 1995, Shoreham will be cancelled and remain unused, and Rancho Seco will continue to operate for the duration of its life. In addition, Vogtle 2 (Georgia Power), Limerick 2 (Philadelphia Electric), Comanche Peak 1 and 2 (Texas Utilities), South Texas 1 and 2 (MAP), and all TVA units except Watts Bars 2 and Bellefonte are assumed to be on-line by 1995; Watts Bar 2 will be on-line by 2000, and Bellefonte will be cancelled.

Average nuclear capacity factors have been increased in the near-term compared with the 1987 EPA Base Case (70 percent versus 67 percent in 1995). In the new reference cases the capacity factor was also increased in 2000 (71 percent versus 67 percent in 2000). The higher capacity factors in 1995 and 2000 reflect better operational practices instituted in, recent years and a continuation of improvements experienced in the last several years (e.g., historical capacity factors in the U.S. have increased from recent low levels of 57 percent in 1986 to 65 percent in 1988). After 2000, as many units age, average capacity factors are assumed to decline to about 66 to 68 percent as unit reliability decreases.

EXHIBIT 41

ICF RESOURCES
INCORPORATED

Mr. Robert A. Beck
Director
Clean Air, Fossil Fuels and
Natural Resources
Edison Electric Institute
1111 19th Street, N.W.
Washington, D.C. 20036

July 26, 1989

Dear Mr. Beck:

In your letter of July 12, 1989, you raised a number of questions regarding the assumptions used in the 1989 Base Case analyses performed by ICF Resources for EPA. We are happy in this letter to respond to these questions. In addition, we have enclosed a copy of the report *1989 Base Case Forecasts* for your use and review.

The 1989 EPA Base Case analyses were conducted by ICF for EPA's Office of Policy, Planning and Evaluation to reassess future utility air emission trends using up-to-date sets of assumptions. In the Base Case analyses, EPA had us examine two cases – a "High" case and "Low" case – so as to present a reasonable possible range of future utility emissions. To achieve this result, these cases incorporated different sets of assumptions that would respectively result in higher and lower utility SO_2 emissions trends.

Fossil powerplant lifetime assumptions were among the important differences in assumptions between the two cases: 55 years was assumed for all large (i.e., larger than 50 megawatt) fossil steam generating units in the Low case, while 65 years was assumed for all large fossil steam units in the High case. The difference in assumptions

obviously has an important effect on utility emission trends, as demonstrated in the ICF analysis. Before 1984, EPA had assumed that all fossil-fueled powerplants had a physical, useful operating lifetime of 45 years for al of the analyses performed by ICF for EPA. This assumption was subsequently revised to 60 years for the 1984 Interim EPA Base Case and all following analyses as it became obvious that existing powerplants were being operated for periods longer than 45 years.

For both of the cases evaluated for the 1989 EPA Base Case forecasts, it was assumed that all large oil- and coal-fired powerplant units at 30 years of age would engage in refurbishment activities sufficient to achieve the above-noted powerplant lifetime assumptions. Those units explicitly assumed to repower using a "generic clean coal" technology were not included as part of this universe of "life extended" powerplants. About 350 gigawatts of capacity (about half of all fossil fuel-fired capacity expected to online by 2010) will undertake life extension activities by 2010 under these specific assumptions.

Consistent with previous ICF modeling efforts, it was assumed that net dependable capacity and reliability of existing powerplants would be maintained at design levels for their entire 55 to 65 year lifetime. However, unit heat rates were assumed to increase by 0.25% per year to reflect powerplant aging (i.e., to reflect progressive deterioration in potential power output, combined with a one-time 5% decrease in heat rates assumed to occur at the time of refurbishment (to reflect the restoration of the powerplant to something close to its original design operating efficiency as a result of refurbishment). These assumptions have been included in all of the EPA analyses

by ICF since the 1985 EPA Base Case assessments began in 1984.

Two additional issues related to powerplant refurbishment that were raised either directly or implicitly in your letter include the following:

- The powerplant lifetime/refurbishment assumptions in the 1987 Interim EPA Base Case included an assumed average cost of $200 per kilowatt in early 1986 dollars for all refurbished units. No assumptions regarding the costs of refurbishment were explicitly made in the more recent analyses, however, because the costs of life extension were assumed to be sufficiently low (at $200 per kilowatt in early 1986 dollars or less) that all units would be refurbished and their lives extended under all the environmental regulatory scenarios evaluated. Since these refurbishment costs will be incurred in all cases, they do not affect the analysis of different environmental regulator scenarios.

- As stated on page 29 of the enclosed report, "it was assumed by EPA that that recent WEPCo decision would not result in any significant number of powerplants having to comply with NSPS upon refurbishment." It was also assumed that refurbishment would not result in more stringent emission requirements under PSD. Thus, for purposes of the recent EPA forecasts, the act of refurbishment, (which, for the purposes of the EPA Base Case, means efficiency improvements and other maintenance designed to enable an additional 25-35 years of acceptable operation up to design capacity) was not assumed by EPA to require any refurbished plant to meet tighter new source emission controls.

We hope that this information is useful to you and adequately addresses your questions. Please call should you have any further questions.

Sincerely,

SIGNED BY K.A. SCHWEERS
Kenneth A. Schweers, President
ICF Resources Incorporated

EXHIBIT 42

United States General Accounting Office

GAO	**Report to the Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, House of Representatives**
September 1990	**ELECTRICITY SUPPLY** **Older Plants' Impact on Reliability and Air Quality** [SEAL]

GAO/RCED 90-200

Chapter 3

Changing Air Quality Requirements Could Affect Life Extension Plans

Fossil fuel power plants are significant sources of harmful pollutants, particularly sulfur dioxide and nitrogen oxides, and the plants exempted from the Clean Air Act produce a disproportionately large share of these pollutants. Recent legislative and regulatory developments could require significantly reduced emissions from these exempt plants and could cause electric utilities to alter some planned life extensions projects. Enactment of proposed acid rain control legislation probably would not preclude life extension, but this depends on the legislation's final requirements. Officials of DOE and utility organizations expressed concern, however, that exempt plants altered to extend their service life must meet the act's emission standards if EPA decides, as it did for one plant in 1988, that the alteration would result in increased emissions. According to the officials, the additional costs of achieving the more stringent standards

could discourage some life extension projects. However, such decision one plant in 1988, that the alteration would result in increased emissions. According to the officials, the additional costs of achieving the more stringent standards could discourage some life extension projects. However, such decisions could also reduce the nation's total power plant emissions by eliminating an existing economic incentive to retain exempt plants.

Plants Constructed Before August 1971 Produce the Most Pollutants

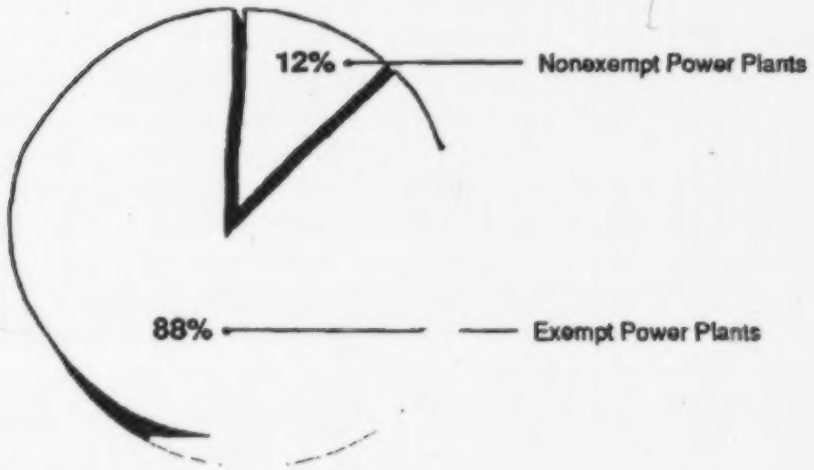
When Congress enacted the Clean Air Amendments of 1970, it exempted power plants constructed prior to the publication of EPA's regulations (August 17, 1971) from having to meet the legislated emission standards. The exempt plants produce a disproportionate share of utilities' sulfur dioxide and nitrogen oxide emissions.[1] Although these plants that were exempted from federal regulations are subject to state regulations, the states generally allow emissions at much higher levels than those specified in the Clean Air Act.

Emissions of sulfur dioxide and nitrogen oxides have associated health and environmental consequences. Sulfur dioxide, a colorless gas with a pungent and irritating odor, can aggravate symptoms of heart and respiratory diseases. Nitrogen oxides, gaseous air pollutants, can also aggravate respiratory problems. Emissions of sulfur dioxide and nitrogen oxides, which have been linked to the formation of acid rain, also represent a threat to natural resources, ecosystems, materials, and visibility.

[1] Burning fossil fuel also produces air pollutants such as particulate matter and carbon dioxide, but because the current Clean Air Act debate relating to utilities focuses on acid rain controls, our analysis was limited to sulfur dioxide and nitrogen oxides.

According to EPA's nationwide data for 1985,[2] the last year for which complete data are available, plants' built prior to August 1971 contribute the majority of fossil fuel plants' emissions of sulfur dioxide and nitrogen oxides. In 1985 fossil fuel power plants emitted 16 million tons of sulfur dioxide; plants built prior to August 17, 1971, emitted 88 per cent of the total (see fig. 3.1). Of the nearly 7 million tons of nitrogen oxides emitted in 1985 by fossil fuel plants, approximately 79 percent was emitted by the exempt plants (see fig. 3.2).

Figure 3.1: 1985 Sulfur Dioxide Emissions by Exempt and Nonexempt Fossil Fuel Power Plants



Note: Total 1985 sulfur dioxide emissions from electric utility fossil steam power plants were 16,046,190 tons.

Source: Prepared by GAO from EPA data.

[2] The data, from EPA's Air and Energy Engineering Research Laboratory, are not measurements of actual pollutants released into the atmosphere, but EPA's best estimates.

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Application of the Clean Air Act's Current Emission Standards to Plants With an Extended Service Life Is Uncertain

In developing regulations following the 1977 Clean Air Act amendments, EPA assumed that utilities would continue to replace most plants at the end of their traditional 30- to 40-year service life; consequently, the regulations do not explicitly address power plant life extension. In a 1988 case, the agency ruled that the Clean Air Act's emission standards would apply to a previously exempt power plant if the utility would pursue its life extension project as proposed. This ruling has created concern among DOE and electric utility organization officials regarding the potential costs, and therefore the economic viability of some life extension projects.

Clean Air Act Regulations Do Not Explicitly Address Life Extension

In enacting the Clean Air Act Amendments of 1977, Congress revised the New Source Performance Standards (NSPS) and established the Prevention of Significant Deterioration (PSD) program. The NSPS, established by Congress under Clean Air Amendments of 1970, regulate the emissions from new sources, including electric utility power plants. The standards were modified in 1977 to further restrict power plant emissions by requiring the use of emission control technology, typically flue gas desulfurization (FGD) equipment for reducing sulfur dioxide emissions, and other types of emission control equipment for reducing emissions of other regulated pollutants. The PSD program was established to preserve air quality in unpolluted areas

of the country by regulating power plants' total annual emissions and, as the NSPS do, by requiring the use of the "best available" emission control equipment. EPA, in formulating the NSPS and the PSD program, included provisions regulating modifications of power plants, but because it did not anticipate life extension, it did not explicitly address life extension projects.

While Congress exempted plants constructed prior to the enactment of the new emission standards, it also instructed EPA to apply the standards where EPA determines a plant has been "modified." In amending the act in 1970, Congress defined a modification as a physical or operational change to an existing facility resulting in an increase in the emission of any controlled pollutants or of pollutants not previously emitted. The NSPS are triggered by any change that increases the hourly emission rate for any controlled pollutant. The PSD program provisions are triggered by any change that increases the total amount of annual emissions for any controlled pollutant. EPA also applies the new emission standards in cases where it determines a plant has been "reconstructed" – a determination applicable if the cost of the alteration exceeds 50 percent of the cost that would be incurred to construct a comparable new facility.

The regulations regarding power plant modifications contain exemptions allowing utilities to undertake certain routine activities that could increase emissions without making the plant subject to either the NSPS or the PSD program. These activities include routine maintenance, routine repair and replacement of equipment, and certain operational changes, such as increasing the hours of operation in response to a higher demand for electricity.

Life Extension Projects May Constitute Modifications or Reconstructions

Power plant life extension projects involve physical or operational changes to power plants that potentially can invoke either the modification or reconstruction provisions and thus trigger the NSPS and the PSD program provisions. In recent years, EPA, DOE, and the utility industry recognized the potential for these projects to invoke either the modification or reconstruction rules.

In March 1986 members of EPA's policy analysis staff noted the trend toward power plant life extension and its adverse effect on attempts to reduce sulfur dioxide emissions.[3] Explaining ways in which plants undergoing life extension might be required to achieve the NSPS and the PSD program provisions, the article suggested, for example, that the reconstruction rule might be revised or that all power plants over 30 years of age could be required to achieve the NSPS and the PSD program provisions.

Various DOE and industry studies of life extension and guidelines for implementing life extension programs also have noted that the modification or reconstruction rules might be invoked by life extension projects thus making previously exempt plants subject to the requirements of the NSPS and the PSD program. These documents suggested that utilities planning life extension projects should incorporate into their decision process the possibility of having to meet stricter environmental standards. In 1987

[3] DeMocker, Greenwald, and Schwengels, "Extended Lifetimes for Coal-fired Power Plants: Effect Upon Air Quality," *Public Utilities Fortnightly* (Mar. 20, 1986).

EPRI noted that plant life extension projects involve the risk that the NSPS could be applied.[4]

In September 1988, after the Wisconsin Department of Natural Resources asked for EPA's review of the Wisconsin Electric Power Company's (WEPCO) proposed life extension project. EPA determined that the project would constitute a "modification" under the act and that the plant, if altered as proposed, would be required to meet the act's more stringent emission standards. This decision was the first instance of EPA's requiring a plant undergoing life extension to achieve the NSPS and the PSD program requirements. EPA's ruling was based on a determination that (1) the proposed changes to the power plant would go beyond "routine repair" and would therefore not be exempt and (2) emissions would increase as a result of the project.

The utility challenged EPA's definition of routine repair and its method for calculating increases in emissions. Following litigation in January 1990 the United States Court of Appeals for the Seventh Circuit affirmed EPA's application of the NSPS, but remanded the decision to apply the PSD program standards back to EPA for further review. Specifically the Court held that in this instance, the proposed changes were not routine and thus not exempt from the standards and that an increased emission rate would result; thus, EPA had correctly applied the NSPS. However, the court ruled that EPA had not used an appropriate method for determining the total annual increase in emissions and instructed EPA to reexamine the application of the PSD program provisions. The Court added that EPA is entitled to broad

[4] John Douglas, "Longer Life for Fossil Fuel Plants," *EPRI Journal* (July/Aug. 1987)

discretion in interpreting the technical provisions of the Clean Air Act and its own regulations.[5]

Effects of WEPCO Ruling Are Uncertain

Officials of DOE and utility organizations have expressed concern that the WEPCO decision may result in EPA's application of the NSPS and the PSD program requirements to other previously exempt power plants and that the additional costs of achieving these standards and requirements could discourage some life extension projects. However, EPA officials do not consider WEPCO's project typical of most utility life extension projects, and they expect that the ruling will not significantly affect utilities' decisions to undertake power plant life extension projects.

According to NERC, the ruling could seriously threaten the reliability of the nation's electric system if it were applied to other life extension projects, as the additional cost for emission control equipment could force utilities to remove older plants from service. According to EEI, serious problems with the reliability of the electric system could be encountered, including brownouts, as utilities adjust their plans and pursue other sources of new generating capacity. The Utility Air Regulatory Group (UARG)[6] has expressed concern over whether power plants can be maintained properly without being required to achieve the more stringent emission standards. DOE has stated that EPA's WEPCO ruling could discharge some utilities from extending the service life of their power plants and that this could aggravate an expected shortfall in electric generating capacity in the 1990s.

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[5] *Wisconsin Electric Power Co. v. Reilly, AD. EPA*, 893 F.2d 901 (7th Cir. 1990)

[6] UARG is an ad hoc association of utilities and trade associations of the utility industry.

The frequent application of the NSPS and the PSD program requirements to previously exempt power plants or similar legislative action could improve air quality. During 1985 power plants exempt from the Clean Air Act's more stringent emission standards produced sulfur dioxide emissions at up to nearly 3 times the rate, per unit of electricity produced, of power plants subject to these standards. Because new power plants are subject to more stringent emission standards, there is an incentive to extend the life of existing plants that are not subject to these costly standards. If decisions similar to the WEPCO decision were rendered more often, a decision to build a new plant or extend the service life of an existing plant would depend on the relative costs of two sources emitting pollution at a low rate, and not on a comparison of the high cost of a new plant emitting pollution at a low rate and the lower cost of an older plant emitting pollution at a higher rate.

Officials from seven of the nine utilities we contacted indicated that the WEPCO decision was not interfering with their plans for the continued operation of their existing plants.[7] These officials explained that WEPCO's project involves the restoration of generating capacity at a deteriorated plant and that this situation is unlikely to occur in their systems because their maintenance programs prevent their plants from deteriorating. Officials from one of the nine utilities we contacted indicated that the WEPCO ruling has played a role in the utility's revising its plans. In its annual submission to its public utility commission, this utility explained that because of legislative and regulatory uncertainties (including the uncertainty raised by the WEPCO decision), it has deferred implementing a life extension program. However, the utility reported that it

[7] One utility did not respond to our questions about the potential impact of the WEPCO ruling on power plant projects.

will continue to maintain its plants to ensure their reliable and safe operation.

According to EPA policy officials, WEPCO's life extension project is not typical of the majority of utilities' life extension projects, and concerns that the agency will broadly apply the ruling it applied to WEPCO's project are unfounded. The officials noted that many life extension projects do not result in increased emissions, while other activities are routine in nature and thus exempt from the modification rule. Lending evidence to the officials' statements, EPA's 1989 emission forecast assumed that the WEPCO decision would not result in a significant number of additional power plants' having to comply with the NSPS and the PSD program requirements.

Supplying Electricity May Result in Short-term and Long-term Trade-offs

In the short term, utilities may face trade-offs between ensuring the existence of generating capacity sufficient to meet needs and reducing air pollution. More stringent emission requirements could adversely affect electricity supply in the short term. However, applying more stringent emission requirements to currently exempt plants would have the benefit of eliminating the power plants that pollute the most.

A trade-off between sufficient capacity and clean air need not exist in the long term. Requiring exempt power plants to meet the requirements of the NSPS and PSD program would result in emission reductions at existing plants or less-polluting new plants. The cost of reducing emissions would be reflected in the cost of producing electricity. The long-term trade-off could be between

cleaner air and more expensive electricity rather than between cleaner air and insufficient capacity.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA, Plaintiff,	:	
ENVIRONMENTAL DEFENSE, NORTH CAROLINA SIERRA CLUB, NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP Plaintiff-Intervenors	:	Civil Action No. 1:00 CV 1262
v.	:	
DUKE ENERGY CORPORATION, Defendant.	:	

Washington, D.C.

Wednesday, May 15, 2002

Videotaped, I-Dep Deposition of STEPHEN TIBER, a witness herein, called for examination by counsel for Defendant in the above-entitled matter, pursuant to notice, the witness being duly sworn by SUSAN L. CIMINELLI, a Notary Public in and for the District of Columbia, taken at the offices of Hunton & Williams, 1900 K Street, N.W., Washington, D.C. at 2:08 p.m., Wednesday, May 15, 2002, and the proceedings being taken down by Stenotype by SUSAN L. CIMINELLI, CRR, RPR, and transcribed under her direction.

* * *

[37] [Q.] . . . Let me ask you first when it uses words like EPA policy officials, who is it, what officials is it likely talking about?

A. These would be EPA employees in a policy capacity with whom GAO spoke.

Q. Would that have included Rob Brenner at that time?

A. According to what Dan Feehan, the GAO evaluator indicated, he spoke with Rob Brenner during the course of the review.

Q. Would Rob Brenner have been a policy official, and EPA policy official at that time?

A. I believe so.

Q. Let's assume that in your meetings in April of 1990 that EPA representatives told GAO that GAO had some of the facts wrong here in the statement. Has that happened on other occasions?

MR. KAPLAN: Objection to the form.

BY MR. COTTINGHAM:

Q. Has that kind of thing happened?

A. The purpose of a meeting to discuss a statement of facts is to discuss the content of a [38] statement which might include misinformation, incomplete information.

Q. If the facts are incorrect and EPA tells GAO in those meetings that the facts are incorrect, is it normal for GAO to correct the facts before issuing its report?

MR. KAPLAN: Objection to the form. It's beyond the designation.

BY MR. COTTINGHAM:

Q. Go ahead.

A. GAO will revise the draft document if EPA can support its position.

Q. Going back to the statement on page 5 of the statement of facts, which says according to EPA policy officials, the WEPCO decision does not represent a broad EPA policy to control emissions from life extended power plants. Was that in fact a correct statement in 1990?

A. Again, I don't have supporting documents as to what was said at that time. I did speak with Dan Feehan about not this document but the report itself.

Q. Okay.

A. And he did discuss that he did remember talking with Rob Brenner when in the report the [39] document refers to – let's see, on – I didn't see this at the bottom of page 30. In the report, it says according to EPA officials.

Q. It says according to EPA policy officials?

A. Policy officials. Correct. I'm sorry. According to EPA policy officials, he remembers a meeting with Rob Brenner, among others, where they were giving their professional opinions based on information available at that time. They, he remembered that the EPA staff didn't offer, or didn't have or refer to documents that, that reflect this professional viewpoint.

Q. This is what Don Feehan told you?

A. Yes. Dan. Dan Feehan. Right.

Q. What else can you remember that Dan Feehan told you?

A. He told me that he lived in a number of cities while he was conducting this report. We didn't go into any great detail about it. Though, we were discussing this particular point, and I was asking him what he recalled about who the statement could be attributed to, and –

Q. You are talking about on page 30 where it says, According to EPA policy officials, WEPCO's life extension project is not typical of the majority of [40] utilities' life extension projects and concerns that the agency will broadly apply the ruling it applied to WEPCO's project are unfounded. And there is more after that.

A. Yes. Right. Right. It's that paragraph that we were discussing.

Q. You were trying to find out from Dan Feehan who gave him that information and what they told him?

A. Correct. Exactly. Exactly. And if there was any additional supporting information, you know, to support their case. Dan mentioned that if there were, that they would have referenced it in the report to support the statement. That's just standard GAO practice to support their findings.

Q. But his recollection is that Rob Brenner and others in a meeting told him what is written in the report on page 30 and 31?

A. Correct.

Q. So who else was in the meeting other than Dan Feehan and Rob Brenner where this information was conveyed?

A. Dan Feehan didn't recall the others.

Q. But there were other people from EPA in the meeting, correct? Or according to what Dan [41] Feehan remembers?

A. Correct. Dan indicated that there were others present.

Q. Right. And were there others from GAO present?

A. We didn't discuss that.

Q. Okay. Did you read this entire paragraph to Dan Feehan or discuss the entire paragraph, we were just reading the first sentence but it goes on to say the officials noted, and that's talking about the EPA policy officials, correct?

A. Yes. That is correct.

Q. The officials noted that many life extension projects do not result in increased emissions while other activities are routine in nature, and thus exempt from the modification rule. And that's part of what GAO was told by these EPA policy officials who Mr. Feehan remembers, including Rob Brenner?

MR. KAPLAN: Objection to the form.

BY MR. COTTINGHAM:

Q. Correct. Did you get that?

A. Sorry.

Q. That entire paragraph is what Mr. Feehan remembers the EPA policy officials, including Rob [42] Brenner, telling him, correct?

A. That is.

Q. The GAO report goes on in that paragraph that says, Lending evidence to the official's statements, EPA's 1989 emissions forecast assumed that the WEPCO decision would not result in a significant number of additional power plants having to comply with the NSPS and the PSD program requirements. Do you see that?

A. Yes.

Q. Did you discuss that additional support for the policy official's statements with Mr. Feehan?

A. I don't recall that we reviewed the last sentence, though what I do recall Dan mentioning was that Rob Brenner and others were giving their professional opinion of data that they knew at that time.

Q. Do you know what the EPA's 1989 emissions forecast is?

A. Since I'm not in that program and intimately aware with it, I don't know what the forecast was.

* * *

EXHIBIT 44

[LOGO] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
AIR AND RADIATION

Jun. 19, 1991

Hono e John D. Dingell
Chairman, Subcommittee on
Oversight and Investigations
Committee on Energy and Commerce
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for enclosing a copy of the Septemb . 1990 GAO report entitled "Electricity supply – Older Plants' Impact on Reliability and Air Quality" with your October 9, 1990 letter. Your letter raises several questions concerning the impact of older power plants' "life extension", on the reliability of electricity supply. Enclosed are responses to your questions.

If you have any further questions, please do not hesitate to contact us.

Sincerely yours,

/s/ for
William G. Rosenberg
Assistant Administrator
for Air and Radiation

Enclosure

cc: Honorable Charles A. Bowsher
Comptroller General, GAO

Question 1.

Please explain what measures (other than life extensions) will be used to meet "future demand". What will be the role of conservation and new plants?

Response 1.

The role of renewable resources and *especially conservation* in meeting *current demand* is significantly higher than 10 years ago, despite regulatory obstacles, inequitable incentives and insufficient research and development support. In fact, few conventional electric generation options can today compete with energy efficiency investment to meet future demand. Recent estimates suggest that energy demand can be halved by 2010 with a savings of over 4300 billion to the U.S. economy.

The cost-competitiveness of conservation and renewable resources will be further increased by the Clean Air Act Amendments of 1990 and assessments of environmental externalities. Preventing significant increments of pollution through energy efficiency can be an important supplement to "end of smokestack/scrubber" technologies.

In addition to lower capital costs, lower financial risks, high reliability and pollution prevention benefits, energy efficiency is achieved by *investing* in the operation and maintenance of the various energy-consuming sectors of the economy. Any improvements in energy productivity (increasing economic output with stable or declining

energy input) will simultaneously enhance national energy security and the international competitiveness of American business. Finally, the development of a competitive "efficiency and renewable resource industry" to compete with such German and Japanese initiatives will be another by-product of this quicker, cheaper, cleaner approach to future demand.

Question 2.

Are such (life) extensions going to be cheaper and less time consuming with the enactment of title I of the Clean Air Act bill, S. 1630? Please explain.

Response 2.

Title I does not have much direct bearing on life extension projects. New source review is only implicated by life extension projects to the extent that they increase emissions and are thus considered modifications under Part C or D. As discussed in the answer to question 5, companies have and use discretion in project design and permitting to avoid increasing emissions and triggering the modification provisions. However, even if they could not or did not "net out" of new source review, power plant modifications would not face any significantly different treatment under the amendments in SO_2 or PM-10 nonattainment areas. Of course, if, due to a SIP call in a nonattainment area the state required the power plants to reduce their emissions, presumably the state would apply such a requirement to existing sources without regard to whether they were undergoing modification. In that case the cost of pollution controls would be attributed to the nonattainment program rather than the new source review program.

In ozone nonattainment areas where major stationary sources of NOx would be required to meet the same requirements as major stationary sources of VOC, under Section 182(f) of the amendments; power plants would be subject to the RACT provisions. Power plants undergoing a covered modification (under the new source review program) would have to achieve LAER instead. Like all major stationary sources in these areas, they would also have to procure offsets at the ratios stipulated for the various nonattainment severity categories. The cost of NOx offsets (if they were required) would thus increase the cost of a modification.

Question 3.

Please discuss in greater detail the "reliability of the electricity supply" from life extensions, taking into account the "different approaches to life extensions" discussed in the GAO report. Is there reason to be concerned about the reliability of these plants in meeting demand? Please explain. If they are not reliable, what are the contingencies?

Response 3.

EPA has not looked into the issue of "reliability of electricity supply" from life extensions.

Question 4

Do you agree with the demand figures? What are the real and timely alternatives to life extension to meet this anticipated demand?

Response 4.

The demand figures are included in a statement, quoted below, that appears on page 8 of the GAO report.

> The Department of Energy (DOE) and industry experts predict that demand for electricity will increase through the 1990s, outstripping planned additions to generating capacity. In 1989 the nation's total electric generating capacity was about 684,000 megawatts (MW). DOE projects a need for an additional 102,000 MW capacity by the year 2000, and utilities have made plans to construct plants that will produce only about one-third of this additional amount. Also, in 1989 the North American Electric Reliability Council (NERC) projected that utilities' planned additions would be insufficient by 1998. Moreover, according to NERC, some areas of the eastern United States will be at serious risk of supply disruptions in the early 1990s if the demand for electricity reaches the high end of the organization's forecast.

First of all, it is important to note the distinction between the capacity supply and capacity demand estimates. Increase in electric demand (in gigawatts) between 1989 and 2000 refers to the increase in annual peak demand by 2000. Increase in "capacity demand" is defined to include the change in peak demand plus a planning or required reserve margin. The increase in generating capacity needed (or "capacity supply") estimates reflect the difference between current (1989) electric generating capacity estimates (including cogeneration and imports) and future capacity needs (which are assumed to equal the "capacity demand" estimates). Because there is excess capacity in some areas of the country today, the required

increase in supply will be less than the forecasted increase in demand. *The DOE statement cited by GAO appears to refer to a required increase in capacity supply and the NERC forecasts refer only to capacity demand (as well as planned capacity additions).*

Growth in capacity demand (1989-2000) forecasted by NERC and adjusted for 2000 is about 207 gigawatts, and falls within the range forecasted in the EPA high and low base cases for the new acid rain provisions in the Clean Air Act (about 138-213 gigawatts). *EPA agrees with the NERC demand capacity figure.*

The increase in generating capacity supply needed (1989-2000) cited by GAO as DOE's forecast is 102 gigawatts. This is less than assumed in the EPA base cases. Note however, according to DOE/EIA "1990 Annual Energy Outlook", the increase in capacity supply needed was forecasted to be 186 gigawatts, which is in the upper end of the range assumed in the EPA base cases. *So EPA is unsure of GAO's statement regarding DOE's forecast of 102 gigawatts.*

Question 5.

I am uncertain about this EPA comment as reported by EPA. I can read it several ways, particularly with the word "significantly." What does EPA intend or mean? What is DOE's view? How will WEPCO affect acid rain legislation plants? Please explain. What is the Administration doing to clarify the matter? To what extent is the matter fully in EPA's control? What legal or other challenges are possible or likely? What relevant interpretative rulings has EPA issued or planned? What is their legal effect? How are they helpful? Please consider in your reply the

enclosed letter from the National Independent Energy Producers.

Response 5.

Some background on the NSPS and PSD programs and the life extension project at WEPCO's Port Washington, Wisconsin facility, may be helpful to respond to these questions. As noted in the GAO report, Congress dictated that modifications at existing plants be treated as new sources for purposes of the NSPS and PSD (as well as nonattainment new source review) provisions of the Clean Air Act. The Act defines modification as: 1) a physical or operational change that 2) increases emissions. Under the NSPS program, emissions increases are measured in terms of hourly potential emissions, while PSD considers increases in annual actual emissions. EPA's regulations contain several limitations on the broad statutory language, including, for example, an exemption, for routine changes.

In addition, EPA regulations contain broad "netting" provisions that enable source owners to offset emissions increases with equivalent reductions and thereby avoid the applicability of new source emissions standards or BACT limits. Under NSPS, netting may occur within the affected facility (e.g., an individual utility boiler) and involve physical restrictions on emissions capabilities (such as addition of pollution control equipment). Under PSD and nonattainment area new source review, netting may occur within the entire plant and may involve operational as well as physical restrictions on the plant's emissions.

Prior to the *WEPCO* court decision, EPA applied a "current actual" to "future potential" test to all nonroutine

changes at existing plants in determining emissions increases under the PSD bubble rule. That is, EPA assumed initially that following the changes, the plant would operate at its full potential to emit. Source owners could – and frequently did – avoid PSD applicability, however, through legally binding physical or operational limitations restricting actual emissions to levels not significantly greater than levels prior to the change. The owner would estimate the source's actual emissions following the change. If the owner projected that the source likely would not increase its actual emissions following the change, it would accept an actual emissions "cap." However, if the projection later proved inaccurate, and the owner desired to increase the source's actual emissions, it would need to obtain a new source permit at that time. As a result of the *WEPCO* court decision, modifications involving "like-kind" replacements, such as the WEPCO life extension project itself, now will be able to use a "current actual" to "future actual" test for PSD applicability purposes. In essence, this means that EPA, rather than the source owner, is responsible for accurately projecting a plant's actual emissions following a modification to determine whether the plant's emissions are within the bubble. If EPA projects no actual emissions increase, the source's emissions would not be legally capped.

Regarding WEPCO's life extension project, due to age-related deterioration and loss of efficiency, both the physical capability and actual utilization of the WEPCO power plant had greatly declined over time. The project involved the replacement of major internal components at all five of WEPCO's existing coal-fired steam electric boilers at its Port Washington plant. This project would restore the physical and economic viability of the existing powerplant

and extend its useful life for approximately 20 years. In its decision regarding WEPCO, EPA determined that the physical changes contemplated by the proposed project were nonroutine in nature and consequently were not categorically excluded from PSD or NSPS modification requirements. As indicated in the GAO report, it is expected that most utility projects will *not* be similar to the WEPCO situation. That is, EPA believes that most utilities conduct an ongoing maintenance program at existing plants which prevents deterioration of production capacity and utilization levels. To the extent that life extensions at such plants involve only an enhanced maintenance program, new source requirements may not apply for two reasons. First, the life extension may involve no nonroutine physical or operational change. If so, it would be excluded from new source provisions for that reason alone. Even if the life extension did involve nonroutine changes, it still would not trigger new source requirements if it did not increase pollution on an hourly basis (for NSPS purposes) or an annual basis (for PSD and nonattainment new source review purposes). It should also be noted that WEPCO is *not* a Clean Coal Technology or repowering project, nor is it (1) being implemented to comply with Title IV or any other Clean Air Act requirements, or (2) a basis (for PSD and nonattainment new source review purposes). It should also be noted that WEPCO is *not* a Clean Coal Technology or repowering project, nor is it (1) being implemented to comply with Title IV or any other Clean Air Act requirements, or (2) a voluntary pollution control project or research project of any kind. EPA's *WEPCO* decision only applies to utilities proposing "WEPCO type" changes, i.e., nonroutine replacement that would result in an actual emissions increase. This is the

basis for the EPA statement that the ruling is not expected to significantly affect power plant life extension projects.

In addition, it is important to point out that GAO was incorrect in its formulation of the choice that utility companies actually face. GAO stated that the utility company judgment on whether to build a new plant or instead to extend the service life of an existing plant depends on the relative costs of "two sources emitting pollution at a low rate, and not on a comparison of the high cost of a new plant emitting pollution at a low rate and the lower cost of an older plant emitting pollution at a higher rate." In fact, as explained above, due to EPA's netting rules, the owner of an existing source almost always has the choice of merely avoiding *increases* in emissions at existing plants, and is *not* required to meet the stringent emissions limits that apply to wholly new sources. Thus, using the nomenclature of the GAO report, the utility's choice is indeed between a new, "lower" emitting plant and an older, "higher" emitting plant. The only condition EPA has ever placed on the latter option is to insist that the source owner prevent the older plant from emitting at even higher levels.

EPA recently proposed a rule (copy enclosed) that would revise the agency's Prevention of Significant Deterioration (PSD) and nonattainment New Source Review regulations for the addition, replacement or use of pollution control projects (a project undertaken at a utility unit to reduce emission) at existing electric utility steam generating units. Changes that occur at a source that are intended to restore capacity or to improve the operational efficiency of the facility are not considered to be part of a pollution control project for purposes of this proposal. The proposal would not include pollution control projects as

modifications, unless the reviewing authority determines that the project will render the unit less environmentally beneficial. Until the proposal is final, EPA will continue its current policy of determining of pollution control projects are excluded from NSR on a case-by-case basis. The implementation of the proposed rule should not cause any negative environmental effects.

EXHIBIT 58

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
ENVIRONMENTAL DEFENSE, NORTH CAROLINA SIERRA CLUB, NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP	)	Civil Action No. 1:00 CV 1262
Plaintiff-Intervenors,	)	
v.	)	
DUKE ENERGY CORPORATION	)	
Defendant	)	

DECLARATION OF RICKEY J. DEESE

I, Rickey J. Deese, being of legal age and pursuant to 28 U.S.C. § 1746, declare:

1. I am General Manager of Technical Services in the Fossil-Hydro Division of Duke Power ("Duke"), the regulated arm of Duke Energy Corporation which has the responsibility of providing electric power to customers in portions of North Carolina and South Carolina. I am submitting this declaration based on my own personal knowledge and belief in support of Duke Energy Corporation's brief in support of its motion for summary judgment.

2. Duke and its predecessor entities have provided electricity to the Carolinas since the early 1900s. Duke's generation portfolio currently includes nuclear, hydroelectric, gas-fired combustion turbine, and coal-fired generating units. Duke has 30 coal-fired electric generating units at 8 plants located throughout North Carolina and South Carolina.

3. Duke's fleet of coal-fired electric generating units have an established history of operation, having been placed in service between 1940 and 1975. A list of these units, their operational dates, and their net rated generating capacities is found at attachment A hereto.

4. The boilers on these units are large, building-like structures – ranging from 6 to 20 stories high – that contain thousands of steel tubes in which water is heated to superheated steam with temperatures in excess of 900°F. These tubes are typically found in collections of tube assemblies, including the economizer tubes, where water is initially heated; the furnace waterwall tubes, where the water begins a phase change into steam; the superheater tubes, where the temperature of the steam is raised just before it exits the boiler and reaches the turbine; and the reheater tubes, where steam from the turbine is reheated and returned to the turbine. The furnace waterwall tubes form the walls of the boilers, and provide an envelope for coal combustion while also absorbing heat.

5. The boilers create steam by burning coal. Coal is ground to fine powder in pulverizers and moves through pipes to burners along the boiler walls. When the grounded coal is ignited in the furnace, "flue gas" is created with temperatures of up to 3000°F. The flue gas, which contains sulfur dioxide ("SO_2"), ash particles or particulate matter

("PM"), and nitrogen oxides ("NO_x"), passes around the tubes and tube assemblies. Water in the tubes becomes steam, which is then heated to superheated steam. Once the flue gas passes through the boiler, it is treated for emissions and then exits through a stack.

6. The superheated steam then enters the turbines; there it spins the turbine rotors, which are connected to a generator. The generator transforms the mechanical energy of the spinning rotors into electric energy. The turbines typically have a high pressure section, an intermediate pressure section and a low pressure section. Steam is first used in the high pressure section. The steam exiting the high pressure section is returned to the boiler, where it enters the reheater tube assembly and is reheated. The reheated steam is returned to the intermediate and then to the low-pressure sections of the turbine. After the steam completes its journey through the turbine sections, it is converted to water in condensers and pumped through feedwater heaters back to the economizer, where it begins the entire steam cycle process again.

7. There are some exceptions to this general configuration among Duke's coal-fired electric generating units. For example, Buck Units 3 and 4 and Cliffside Units 1-4 do not have reheat cycles, while Marshall Units 3 and 4 each have dual reheat cycles; Furthermore, some units, such as Buck Unit 3, do not have an economizer.

8. The thousands of steel tubes and assemblies inside the boilers are called pressurized parts. They are built to withstand extremely high steam pressures and temperatures inside the tubes, as well as hot gases and combustion by products passing outside the tubes.

9. Due to corrosion, erosion, fatigue, pressure, and temperature, the tubes and assemblies must be maintained, repaired, and replaced to maintain the safety and reliability of the units. Otherwise, tubes could fail and boilers could rupture, causing bodily harm to plant workers and disrupting service.

10. Duke regularly undertakes maintenance, repair and replacement activities on its coal-fired electric generating units during planned turbine outages – during which time the unit must be taken offline for thorough inspection of the turbine components. These outages are usually scheduled to occur at each unit every 48 to 84 months, depending upon the needs of the unit and the system, during either the spring or fall. Such outages can last from several weeks to months in duration depending upon the scope of work required.

11. None of the component repairs and replacements cited by Plaintiff in the Notice of Violation or Complaint resulted in an increase in the units' maximum hourly emissions rate or its maximum coal-burning capacity. Rather, the work was intended to and did maintain the availability, reliability, efficiency and safety of the units.

I declare under penalty of perjury that the foregoing is true and correct. Executed this ___ day of January, 2003.

/s/ Rickey J. Deese
Rickey J. Deese

Plant	Unit	Commercial Operation	MNDC
Allen	1	6/11/57	165
	2	11/25/57	150
	3	10/18/59	265
	4	10/10/60	275
	5	7/3/61	270
			1125
Belews Creek	1	8/5/74	1120
	2	12/13/75	1120
			2240
Buck	3	7/1/41	70
	4	9/10/42	38
	5	9/7/53	128
	6	12/3/53	128
			364
Cliffside	1	7/9/40	38
	2	8/11/40	38
	3	5/19/48	61
	4	10/31/48	61
	5	6/20/72	562
			760
Dan River	1	12/11/49	
	2	3/3/50	
	3	8/24/55	142
			142
Lee	1	3/11/51	100
	2	7/16/51	100
	3	12/12/58	170
			370
Marshall	1	3/21/65	385
	2	4/17/66	385
	3	5/15/69	660
	4	5/1/70	630
			2060

Riverbend	4	10/20/52	94
	5	11/22/52	94
	6	8/12/54	133
	7	11/2/54	133
			454

EXHIBIT 59

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA, Plaintiff, ENVIRONMENTAL DEFENSE, NORTH CAROLINA SIERRA CLUB, NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP Plaintiff-Intervenors, v. DUKE ENERGY CORPORATION Defendant	)	Civil Action No. 1:00 CV 1262

DECLARATION OF KRIS W. KNUDSEN

I, Kris W. Knudsen, being of legal age and pursuant to 28 U.S.C. § 1746, declare:

1. Since 1979 I have been employed by Duke Power Company ("Duke"), the regulated arm of Duke Energy Corporation which has the responsibility for providing electric power to customers in portions of North Carolina and South Carolina. My current position is Senior Air Compliance Technical Consultant. I am submitting this declaration based on my own personal knowledge and belief in support of Duke Energy Corporation's brief in support of its motion for summary judgment.

2. Duke has a generation portfolio that includes 30 coal-fired electric generating units at eight plants located throughout North Carolina and South Carolina. Duke operates these units in compliance with two sets of permits: state operating permits and Acid Rain Program permits. In addition, the Lee Steam Station has a state operating permit issued in accordance with the federal Clean Air Act Title V operating permit program.

3. The state operating permits and Acid Rain Program permits are issued by North Carolina's Department of Environment and Natural Resources ("NCDENR") or by South Carolina's Department of Health and Environmental Control ("SCDHEC"). The Acid Rain Program permits and the Title V permit for Lee Station were subject to notification and review by the EPA.

4. None of these permits restrict the number of hours Duke can operate these units or the amount of electricity the units can generate, rather they require that the units do not exceed the allowable emission limits and that an emissions allowance is surrendered to EPA for each ton of $S0_2$ emitted

5. Duke has continually maintained all of the state operating permits for its units, even for those units which it placed in Extended Cold Shutdown ("ECS"). In the early 1980s, the addition of large nuclear units, combined with lower than expected load growth, led to less use of Duke's smaller coal-fired units, which began spending relatively long periods of time in "reserve shutdown." Accordingly, starting in 1984, Duke placed 15 of its coal-fired units, with aggregate name plate capacity of about 1440 megawatts, into ECS. Duke made definitive plans for preserving and

conditioning these units while in ECS so that they could be returned to service when demand dictated.

6. During ECS, Duke developed an enhanced maintenance program, which it called the "Plant Modernization Program" or PMP, Performing maintenance, repair and replacement projects on the units while in ECS allowed Duke to utilize its in-house engineering, project management and maintenance resources in an optimum fashion so as to distribute those resources over the units in ECS as well as the other units in the Duke system.

7. On behalf of Duke, Keith Sipe and I regularly communicated with NCDENR on a frequent basis to keep Duke's permits current for those units in ECS and PMP, for permit renewal, or to adjust the annual stack testing schedule required by the permits to accommodate the ECS and PMP schedule. Keith Sipe and I also met with EPA in 1991 to discuss the status of our PMP units relative to allocation of S02 allowances under the Acid Rain Program.

8. EPA's Acid Rain Program was implemented under the Clean Air Act Amendments of 1990. In addition to regulating SO_2 emissions from utility units, the Acid Rain Program also requires existing utility boilers to meet certain NOx emissions limitations. To comply with these requirements, starting in about 1994 and continuing throughout the 1990s, Duke has installed NOx controls called "low-NOx burners" on its existing coal-fired units, thereby lowering their NOx emissions rates to 0.5-0.68.lbs/mmBtu for the two Belews Creek units and less than 0.45 lbs/mmBtu for all other units.

9. Duke is also subject to the so-called NOx SIP Call, under which several states in the eastern half of the United States were required to amend their State Implementation

Plans (SIPS) for NOx to establish a cap-and-trade NOx control system. The NOx SIP Call essentially requires utilities in these states to control, during the "ozone season" (i.e., May-September), the total NOx emissions from their existing and new boilers alike to achieve an overall average level of control of 0.15 lbs/mmBtu. To comply with the NOx SIP Call by 2004, Duke is currently installing additional NOx controls at many of its units. Duke has established NOx emissions allowance accounts and has applied for NOx SIP Call permits for each of its coal-fired units.

10. In addition to these restrictions, North Carolina in 2002 enacted a stringent new air emissions control law which requires greater control of utility SO_2 and NOx emissions than do the current federal requirements. North Carolina's law establishes a system emissions cap for the major utility systems in the state. Rather than mandating unit-by-unit controls, it thus allows Duke to install controls where it makes most technical and economic sense to reduce overall emissions (similar to a cap-and-trade program).

11. Duke's program to meet the new state law will involve the installation of additional NOx controls on 24 units and SO_2 controls on 12 units (covering more than 70% of Duke's coal-fired generation), at a cost of approximately $1.5 billion.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of January, 2003.

/s/ Kris W. Knudson
Kris W. Knduson

EXHIBIT 66

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
ENVIRONMENTAL DEFENSE, NORTH CAROLINA SIERRA CLUB, NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP	:	Civil Action No. 1:00 CV 1262
Plaintiff-Intervenors	:	
v.	:	
DUKE ENERGY CORPORATION,	:	
Defendant.	:	

Washington, D.C.

Monday, November 25, 2002

Videotaped deposition of RANAJIT SAHU, a witness herein, called for examination by counsel for Defendant Duke Energy Corporation in the above-entitled matter, pursuant to notice, the witness being duly sworn by MARY GRACE CASTLEBERRY, a Notary Public in and for the District of Columbia, taken at the offices of U.S. Department of Justice, 1425 New York Avenue, N.W., Washington, D.C. at 9:22 a.m., Monday, November 25, 2002, and

the proceedings being taken down by Stenotype by MARY GRACE CASTLEBERRY., RPR, and

* * *

[7] RANAJIT SAHU,

was called as a witness by counsel for Defendant Duke Energy Corporation, and having been duly sworn by the Notary Public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR DEFENDANT DUKE ENERGY CORPORATION

BY MR. JABER:

Q. Good morning, Mr. Sahu.

A. Good morning.

Q. Would you state your name for the record, please?

A. my name is Ranajit Sahu. I can spell it for you if you want.

Q. Go ahead and do that, please.

A. First name is spelled R-a-n-a-j-i-t. The last name is S-a-h-u.

Q. And you also, go by "Ron Sahu," is that right?

A. I also go by "Ron."

(Sahu Exhibit No. 1 was marked for identification.)

BY MR. JABER:

Q. You were just handed Exhibit Sahu 1. Will you identify the exhibit, please?

A. It looks like it's a notice of deposition

* * *

[142] Q. I asked you, in the WEPCO situation, after the WEPCO – the WEPCO court said you cannot apply actual to potential to this facility because the units have begun normal operations. Do you agree with that? You agree this is what the court said?

A. Yes.

Q. And I'm asking you, once I realize that the rules cannot be applied that way, let's say I agree with that, let's say EPA agrees with that, the rules cannot be applied that way, what in the 1980 rules tells me how I should determine whether those physical changes resulted in a net emissions increase, and were therefore a major modification under the PSD rules?

A. I answered that before. I mean, I told you my answer just a few minutes ago to that.

Q. Is your answer is, there is nothing in the 1980 rules that defines the test?

A. Correct.

Q. Thank you.

(Sahu Exhibit No. 13 was marked for identification.)

BY MR. JABER:

Q. Can you identify Exhibit Sahu 13, Mr. Sahu?

* * *

[156] projected actual.

Q. Okay. Can you show me where in the 1980 rules these tests, the other tests that you did for the 1980 – sorry. Let me start again.

Can you show me where in the 1980 rules the other tests that you applied to the Duke units that were subject to the 1980 rules, where those tests are set forth in the 1980 rules?

A. They're not set forth in the 1980 rules.

Q. Where are they? Where did you get them from?

A. The WEPCO regulations talk about using actual to future actual or representative annual actual.

Q. So you applied the actual to future projected actual methodology in the WEPCO rule to these units too?

A. Yes, I did.

MR. JABER: Let's go off the record.

THE VIDEOGRAPHER: Off the record. 2:29, 52 seconds.

(Recess.)

THE VIDEOGRAPHER: On the record, 2:45, 58 seconds.

BY MR. JABER:

* * *

EXHIBIT 72

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA, Plaintiff, vs DUKE ENERGY CORPORATION, Defendant.	Civil Action No. 1:00 CV 1262 Washington, D.C. October 4, 2001 Volume I

Deposition of:

DAVID A. LLOYD

called for examination by counsel for the defendant, pursuant to notice, at the offices of Hunton & Williams, 1900 K Street, Northwest, Washington, D.C., commencing at 9:30 a.m., before James M. Turner, RMR, Notary Public for the District of Columbia.

* * *

[4] P-R-O-C-E-E-D-I-N-G-S

Thereupon,

DAVID A. LLOYD

was called as a witness and, after being duly sworn by the notary, was examined and testified as follows:

MR. COTTINGHAM: The court reporter signed the confidentiality agreement.

MR. KAPLAN: Okay, good.

MR. COTTINGHAM: I took care of that issue before you all got here.

EXAMINATION BY COUNSEL FOR THE DEFENDANT

BY MR. COTTINGHAM:

Q Your name is David A. Lloyd?

A Yes.

Q You work for the Environmental Protection Agency?

A Yes.

Q You are here in this case pursuant to a 30(b)(5) and (6) deposition notice. Is that correct?

A That's correct.

* * *

[295] Q Is there any particular part of the regulations that caused you to use the GADS data?

A The regulation didn't specify what specific data to use. And I don't think it was really contemplated or laid out in the regulation specific data, just methodologies.

Q Did you use the pre-1992 regulations at all in preparing your calculations?

A For the actual to potential tests that we did, yes.

Q For those calculations you used the pre-1992 regulations?

A We applied the actual potential to the potential test based on those pre-'92 regulations.

Q Did you use the pre-1992 regulations in any other way?

A To the extent they define actual emissions before the project, that in combination with the WEPCO [296] rule, yes.

MR. KAPLAN: Counsel, when you reach a convenient stopping point we could use a break.

MR. COTTINGHAM: We can do that right now while I'm marking this.

(At 11:37 a.m., a recess was taken.)

(No. 15 – Rules in effect before 1992, marked for identification.)

BY MR. COTTINGHAM:

Q Let me show you exhibit 15, which are the rules in effect before 1992. And the reason I wanted to show you those, you said that these helped you to define actual emissions under the 1992 rules, and I wanted you to show us first how you do that or where that is.

A I'm looking under the definition of actual emissions.

Q What page is the page number at the bottom?

A Twenty-four.

Q Okay.

A Where it defines the baseline emissions. Then under number ii, Roman numeral ii, to be the ton – let's see – to be the tons per year emissions which the unit actually emits the pollutant during a two-year [297] period

which preceded a particular date. Then if you go down to number iv, it talks about the emissions after the project being the potential to emit.

Q Number iv says, "For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date." Is that what you are talking, about?

A Uh-huh (affirmative response).

Q Is that the basis for the actual to potential methodology?

A Yes.

Q Now, is it the agency's position that the actual to potential methodology is the methodology that should be used for work performed before 1992?

A It's our position that the actual to potential test is the methodology that the regulation requires before '92.

Q Now, does the WEPCO case tell you anything about whether that is a valid position?

MR. KAPLAN: Objection.

THE WITNESS: The WEPCO case provided for an additional calculation for electric utilities.

* * *

EXHIBIT 89

[LOGO] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Office of Air Quality Planning and Standards
Research Triangle Park, North Carolina 27711

May 10, 1989

MEMORANDUM

SUBJECT: Utility Boiler Life Extension/Repowering (ESD Project 88/95)

FROM: Jack R. Farmer, Director [/s/ Jack]
Emission Standards Division (MD-13)

TO: See Below

The purpose of this memorandum is to request your input and assistance on a project we have started to evaluate life extension and repowering of utility boilers.

Earlier this year, we initiated a study to determine the extent of activities by the electric power companies in utility boiler life extension and repowering. We are undertaking this project along with the Office of Policy, Planning and Evaluation (OPPE), the Office of Policy Analysis and Review (OPAR), and the Stationary Source Compliance Division (SSCD) of the Office of Air Quality Planning and Standards (OAQPS). The study is being done so that we may obtain information to distinguish the types of activities that constitute boiler life extension and repowering from those that are routine maintenance. By gathering this information, we will be in a better position to provide assistance regarding determinations of modification and/or reconstruction and to evaluate any necessary regulatory changes. We are seeking the information presented in Attachment 1 (life extension) and Attachment 2 (repowering). We are planning

to request the information from those utilities that we have identified as having at least considered boiler life extension or repowering, as listed in Attachments 3 and 4, respectively.

Recently we learned that, as a result of an inquiry from Congressman Dingell, Regions IV and VI are seeking the same types of information as we are from two specific utilities believed to have undertaken boiler life extension actions. We have also learned that Region IV intends to solicit this information from all of the utilities within their Region. I understand that Region IV's objective is to determine if any facilities have improperly avoided either prevention of significant deterioration (PSD) permits or applicability of new source performance standards (NSPS).

To avoid duplicate information requests and to facilitate the most effective and complete data gathering effort for life extension and repowering, I would like to solicit input from each Region on the following topics:

1. Are there other utilities (beyond those identified in Attachments 3 and 4) in each Region known or believed to have considered (or undertaken) boiler life extension or repowering activities? Our information is derived from journal articles and limited contact with both EPA and industry personnel and is probably not complete.

2. Are any Regions soliciting information of the type found in Attachments 1 and 2 from utilities known or believed to have considered (or undertaken) boiler life extension or repowering activities, and would you consider using these attachments as a part of your information gathering?

3. Would you consider a Regional Information gathering effort from each utility identified in Item 1 above, and in Attachments 3 and 4, using Attachments 1 or 2 as a part of the mailing? Further, would you consider a Regional data gathering program that would include all utilities?

Please provide me your responses by May 26, 1989. If you have any questions, contact Bill Maxwell (FTS 629-5430).

4. Attachments

Addresses:

Irwin L. Dickstein, Director, Air and Toxics Division, Region VIII
Louis F. Gitto, Director, Air Management Division, Region I
William B. Hathaway, Director, Air, Pesticides, and Toxics Division, Region VI
David P. Howekamp, Director, Air Management Division, Region IX
David Kee, Director Air and Radiation Division, Region V
Thomas J. Maslany, Director, Air Management Division, Region III
Gary L. O'Neal, Director, Air and Toxics Division, Region X
Conrad Simon, Director, Air and Waste Management Division, Region II
Winston A. Smith, Director, Air, Pesticides, and Toxic Management Division, Region IV
William A. Spratlin, Director, Air and Toxic Management Division, Region VII

cc: Ron Shafer, SSCD (EM0341)
Mike Shelby, OPPE (PM-221)
Tony Wayne, OPAR (ANR-443)

Attachment 3. List of Potential Utility Boiler Life Extension Projects

Region		State	Utility	Site
1	I	Connecticut	Northeast Utilities	South Meadow Station
1	I	Massachusetts	Boston Edison	New Boston
1	I	Massachusetts	Boston Edison	Mystic
2	II	New Jersey	GPOSC/Jersey Central Power and Light	
2	II	New Jersey	Atlantic City Electric	B.L. England
2	II	New Jersey	Atlantic City Electric	Deepwater
2	II	New York	New York State Electric and Gas	Greenidge
2	II	New York	Consolidated Edison	Ravenswood
2	II	New York	Niagra Mohawk	C.P. Huntley
2	II	New York	Central Hudson Gas and Electric	Danskarmor Point
3	III		[Illegible] Power	
3	III	Maryland	Potomac Electric Power (PEPCO)	Dickerson
3	III	Pennsylvania	GPUSC/Metropolitan Edison	Titus
3	III	Pennsylvania	GPUSC/Pennsylvania Electric Company	
3	III	Pennsylvania	Philadelphia Electric	Eddystone -
3	III	Pennsylvania	Pennsylvania Power and Light	Brunner Island
3	III	Virginia	Virginia Electric Power (VEPCO)	Chesterfield
3	III	Virginia	Virginia Electric Power (VEPCO)	Yorktown

3	III	Virginia	Potomac Electric Power PEPCO	Potomac River
3	III	West Virginia	Virginia Electric Power (VEPCO)	Mt. Storm
4	IV		Tennessee Valley Authority	
4	IV	Florida	Florida Power Corporation.	Suvanee River
4	IV	Florida	Tampa Electric	Francis J. Cannon
4	IV	North Carolina	Duke Power Company	Allen
4	IV	North Carolina	Duke Power Company	Riverbend
4	IV	North Carolina	Duke Power Company	[Illegible] River
4	IV	North Carolina	Duke Power Company	Lee
4	IV	North Carolina	Duke Power Company	Buck
4	IV	North Carolina	Duke Power Company	Cliffside
5	V	Illinois	Commonwealth Edison	
5	V	Indiana	Northern Indiana Public Utility	
5	V	Indiana	Public Service Company of Indiana	R.E. Gallagher
5	V	Indiana	Public Service Company of Indiana	Wabash River
5	V	Michigan	Consumers Power Corporation	J.P. Whiting
5	V	Michigan	Consumers Power Corporation	D.E. Karen
5	V	Michigan	Consumers Power Corporation	J.E. Campbell

5	V	Michigan	Consumers Power Corporation	B.C. Cobb
5	V	Michigan	Consumers Power Corporation	J.C. Weadock
5	V	Michigan	Detroit Edison	
5	V	Minnesota	Northern States Power	Riverside
5	V	Minnesota	Minnesota Power	M.L. Hibard
5	V	Ohio	Cincinnati Gas and Electric	[Illegible] Beckjord
5	V	Ohio	Cleveland Electric Illuminating Company	
5	V	Wisconsin	Wisconsin Power and Light	
5	V	Wisconsin	Wisconsin Electric Power	Port Washington
5	V	Wisconsin	Wisconsin Public Service	
5	V	Wisconsin	Wisconsin Electric Power	Oak Creek
6	VI	New Mexico	Southwestern Public Services	
6	VI	Texas	Texas Utilities Generating Company (ALCOA)	Sandov
7	VII	Iowa	Iowa Public Services	
7	VII	Kansas	Kansas City Power and Light	
7	VII	Missouri	Independence Power and Light	Blue Valley Station
7	VII	Nebraska	Omaha Public Power	
8	VIII	Colorado	Public Service of Colorado	

9	IX	Arizona	Arizona Public Utilities	
9	IX	California	San Diego Gas and Electric	
9	IX	California	Pacific Gas and Electric Company	Pittsburg
9	IX	Hawaii	Hawaii Power	Kabe
Unknown			Centeris Power	
Unknown			Southern Company Services	

EXHIBIT 99

DUKE POWER COMPANY
LEGAL DEPARTMENT
P.O. BOX 33189
CHARLOTTE, N.C. 26242

August 17, 1983

RONALD V. SHEARIN
ASSISTANT GENERAL COUNSEL **(704) 373-7207**

Mr. Robert F. Helms, Director
Division of Environmental Management
North Carolina Department of Natural
Resources and Community Development
Post Office Box 27687
Raleigh, North Carolina 27611-7687

Re: *Air Permit Requirements*

Dear Mr. Helms:

We are writing to request your concurrence with our interpretation of State regulatory requirements which might be applicable to Duke Power's placement of designated coal-fired units in an extended cold shutdown status. In particular, we are concerned about the future application of Regulations 15 NCAC 2D. 0524 (NEW SOURCE PERFORMANCE STANDARDS) and 15 NCAC 2D. 0530 (PREVENTION OF SIGNIFICANT DETERIORATION).

With recent load growth being less than previously anticipated and with nuclear units coming on-line at both McGuire and Catawba Nuclear Stations, it has become apparent that the Company will not need for several years some of our older coal-fired units in order to have sufficient reserves for meeting projected demand during the 1980's and early 1990's. Beginning in 1984 and during

subsequent years, the Company plans to place a series of older units in an extended cold shutdown status. Based on information currently available, it appears that these units will not be needed until approximately 1991, when they will be brought back on-line with minimal expenditures. While in an extended cold shutdown mode, the units will be properly maintained to permit bringing them on-line as quickly as possible when needed. As a part of the maintenance program, dehumidified air will be circulated through the units to prevent corrosion. It is anticipated that a period of four to six weeks will be required to return a unit to service when needed.

During the period of temporary cold shutdown of these units, it is our intention to retain all operating permits issued by the State under the North Carolina Administrative code. Monitoring and reporting will continue for all stations under the NPDES program while we request exemption from permit conditions applicable to the operation of air pollution control equipment for those units not in operation. Upon restart, Duke will comply with all air permit conditions.

The question has been raised as to whether the Company would be required to meet standards of performance for new stationary sources (NSPS) or be subject to regulations for prevention of significant deterioration of air quality (PSD) at the time of reactivation of units which would have been in an extended shutdown status as described above.

We understand that NSPS regulations would not apply to such reactivation since all of the units in question were constructed well in advance of the August 17, 1971 date set forth in 40 CFR 60.40 and since the reactivation would

not constitute a "modification" under 40 CFR 60.2 or a "reconstruction" under 40 CFR 60.15.

It is also our understanding that such reactivation of a unit subsequent to an extended cold shutdown would not trigger the preconstruction review and permitting requirements of PSD regulations. There would not be a "major modification" of a unit as defined in 40 CFR 51.24(b)(2) inasmuch as there would be no change in the method of operation of the unit in question and air emissions would be no greater than when the unit was previously in operation. We further understand that the State would continue to retain emissions from the temporarily shutdown units in the State air emissions inventory for planning purposes.

We would appreciate your concurrence with our interpretation of the regulations in question prior to our implementation of the extended cold shutdown program for designated units on the Duke system. Please let us know if you need further information or if you desire a meeting in person to discuss this matter further.

Sincerely yours,

DUKE POWER COMPANY

/s/ Ronald V. Shearin
Ronald V. Shearin

cc: Mr. James Wilburn

Chief, Air Management Branch

U.S. Environmental Protection Agency Region IV

345 Courtland Street, N.E.
Atlanta, Georgia 30308

bcc: B.E. Davis
S.C. Griffith
J.E. Lansche
W.O. Parker
B.K. Sipe

EXHIBIT 100

DUKE POWER COMPANY
LEGAL DEPARTMENT
P. O. Box 33189
CHARLOTTE, N. C. 28242

RONALD V. SHEARIN
ASSISTANT GENERAL COUNSEL (704) 373-7207

August 17, 1983

Mr. Roger E. Davis, P.E.
Assistant Deputy Commissioner
Environmental Quality Control
South Carolina Department of Health
and Environmental Control
2600 Bull Street
Columbia, South Carolina 29201

Re: Air Permit Requirements

Dear Mr. Davis:

We are writing to request your concurrence with our interpretation of State regulatory requirements which might be applicable to Duke Power's placement of designated coal-fired units in an extended cold shutdown status. In particular, we are concerned about the future application of Regulations 61-62.1 and 61-62.5.

With recent load growth being less than previously anticipated and with nuclear units coming on-line at both McGuire and Catawba Nuclear Stations, it has become apparent that the Company will not need for several years some of our older coal-fired units in order to have sufficient reserves for meeting projected demand during the 1980's and early 1990's. Beginning in 1984 and during subsequent years, the Company plans to place a series of

older units in an extended cold shutdown status. Based on information currently available, it appears that these units will not be needed until approximately 1991, when they will be brought back on-line with minimal expenditures. While in an extended cold shutdown mode, the units will be properly maintained to permit bringing them on-line as quickly as possible when needed. As a part of the maintenance program, dehumidified air will be circulated through the units to prevent corrosion. It is anticipated that a period of four to six weeks will be required to return a unit to service when needed.

During the period of temporary cold shutdown of these units, it is our intention to retain all operating permits issued by the State. Monitoring and reporting will continue for all Stations under the NPDES program while we request exemption from permit conditions applicable to the operation of air pollution control equipment for those units not in operation. Upon restart, Duke will comply with all air permit conditions.

The question has been raised as to whether the Company would be required to meet standards of performance for new stationary sources (NSPS) or be subject to regulations for prevention of significant deterioration of air quality (PSD) at the time of reactivation of units which would have been in an extended shutdown status as described above.

We understand that NSPS regulations would not apply to such reactivation since all of the units in question were constructed well in advance of the August 17, 1971 date set forth in 40 CFR 60.40 and since the reactivation would not constitute a "modification" under 40 CFR 60.2 or a "reconstruction" under 40 CFR 60.15.

It is also our understanding that such reactivation of a unit subsequent to an extended cold shutdown would not trigger the preconstruction review and permitting requirements of PSD regulations. There would not be a "major modification" of a unit as defined in 40 CFR 51.24(b)(2) inasmuch as there would be no change in the method of operation of the unit in question and air emissions would be no greater than when the unit was previously in operation. We further understand that the State would continue to retain emissions from the temporarily shutdown units in the State air emissions inventory for planning purposes.

We would appreciate your concurrence with our interpretation of the regulations in question prior to our implementation of the extended cold shutdown program for designated units on the Duke system. Please let us know if you need further information or if you desire a meeting in person to discuss this matter further.

Sincerely yours,

DUKE POWER COMPANY

/s/ Ronald V. Shearin
Ronald V. Shearin

cc: Mr. James Wilburn
Chief, Air Management Branch
U.S. Environmental Protection Agency
Region IV
345 Courtland Street, N.E.
Atlanta, Georgia 30308

bcc: B. E. Davis
S. C. Griffith
J. E. Lansche
W. O. Parker
B. K. Sipe

EXHIBIT 101

South Carolina Department of Health and Environmental Control

[LOGO]

[Names And Addresses Omitted In Printing]

August 23, 1983

Mr. Ronald V. Shearin
Assistant General Counsel
Duke Power Company
Legal Department
P. O. Box 33189
Charlotte, NC 28242

xc : B. E. Davis
B. K. Sipe
W. O. Parker
08/26/83

Dear Mr. Shearin:

We concur with your interpretation of the air pollution regulations in regard to the extended cold shutdown of your fossil-fuel fired steam generating units. As long as the shutdown is temporary the units would not be subject to the PSD or NSPS regulations upon reactivation of the units. The conditions you suggested such as equipment maintenance, retention of operating permits and the State's retention of the emissions in the State Emission Inventory will qualify the shutdown as temporary according to our interpretation of the regulations and according to written determinations we have received from EPA.

As you requested, permit conditions relating to satisfactory operational experience, source testing, and reporting requirements will be waived during shutdown. However, within 90 days of re-starting the units a source test will be required to determine compliance with the particulate matter standard.

If you have any further questions regarding air regulations, please contact Gary Nelson at (803) 758-5406.

Very truly yours,

/s/ William W. Culler
William W. Culler, P.E., Director
Division of Engineering Services
Bureau of Air Quality Control

WWC:RKC:is

EXHIBIT 102

[LOGO] North Carolina Department of Natural
Resources & Community Development
James B. Hunt, Jr., Governor Joseph W. Grimsley, Secretary

DIVISION OF ENVIRONMENTAL MANAGEMENT

September 15, 1983

Mr. Ronald V. Shearin
Assistant General Counsel
Duke Power Company
Legal Department
Post Office Box 33189
Charlotte, North Carolina 28242

xc : B. E. Davis
B. K. Sipe
W. O. Parker
09-30-83

Dear Mr. Shearin:

This is in response to your questions about air permit requirements for coal-fired units in an extended cold shutdown status. We concur with your interpretations of the existing permit requirements. Placing units constructed prior to August 17, 1971, in an extended cold shutdown status does not affect the exempt status from 15 NCAC 2D .0524 New Source Performance Standards. If no change in the method of operation will occur and air emissions will not increase then the "Modification" provisions of 40 CFR 60.2 do not apply. The reconstruction provisions of 40 CFR 60.15 will apply if roughly 50% of the cost of a new unit is spent on the existing unit.

The units do not have to meet the Prevention of Significant Deterioration (PSD) requirements of 15 NCAC 2D .0530 if the existing permits remain active and the units are not used for any emissions credits or to project compliance with ambient standards.

The Clean Air Act changes resulting from Federal Legislative action between now and 1991 may affect the interpretations of today. The changes may include the following:

1. Acid rain legislation requirements
2. State-of-the-art changes for boilers and control technology
3. Ambient standard changes
4. Continuous emission or fuel monitoring requirements
5. G.E.P. stack height

The planned shutdown and emergency use of units will be addressed in the Environmental Management Commission review of the utility particulate regulation.

Your planned extended cold shutdowns indicate that Duke Power Company has good management for the future of electric utility needs. We endorse your use of the most efficient units. This will result in less particulate emissions in the State.

Sincerely yours,

/s/
for Robert F. Helms
Director

cc: Fin Johnson
Jim Wilburn

EXHIBIT 103

FOSSIL PRODUCTION DEPARTMENT
P.O. BOX 33189, 422 SOUTH CHURCH STREET
CHARLOTTE, N.C. 28242
(704) 373-4011

April 19, 1985

Mr. Roy M. Davis, Regional Supervisor
Division of Environmental Management
P.O. Box 370
Asheville, North Carolina 28802

Subject: Malfunction Determination
Cliffside Steam Station
File: CS-700.20

In response to your letter dated March 18, 1985 concerning the above subject matter, we have provided a summary of actions that will be taken to minimize opacity and precipitator trips. These actions are given as follows:

Opacity reduction – A number of procedures, components, and systems have been implemented or is currently being supplied to reduce emissions from the Cliffside Station. Units 1 through 4 have been placed in extended cold shutdown. These units will be out of service for several years. New controls and components will be installed in these units which will provide for a more efficient operation, hence a reduction in pollutant emissions.

New, updated boiler controls and have been installed on Unit 5. These controls have made it possible to reduce minimum load from the previous 250 MW to approximately 100 MW. The lower load operation will allow fewer startups, and the associated emissions during startup/shutdown will be reduced.

Updated controls and a flue gas conditioning system are scheduled for installation on the Unit 5 precipitator by December, 1985. The new controls and gas conditioning system should aid in a significant reduction in opacity.

Section Trips – To-date, we have had only three precipitator section trips on the Unit 5 precipitator this year. In 1984 we had a total of eight section trips. We do not consider this to be an excessive number of section trips when compared to other precipitators. However, when sufficient outage time permits (allowing 2-3 days for the precipitator to cool before entering and 2 days for cleaning), an internal inspection of the precipitator will be conducted. The wires and plates will be manually cleaned, as necessary and any broken or damaged wires will be replaced. This should enhance the reliability of the unit and minimize section trips.

Miscellaneous – During startup and shutdown, numerous pumps, piping loops, electrical equipment, etc. are brought into service or taken out of service. Many of these systems are totally automated and some are manually controlled. Synchronizing these systems during non-steady state conditions is quite a demanding process and at times errors do occur. Duke Power has extensive ongoing programs and classes to maximize worker efficiency. These programs have been quite effective in minimizing human error in the work place. The Cliffside plant, as well as other Duke Power stations, have a continual program of increasing plant efficiency and minimizing pollutant emissions.

If additional discussion is required, please contact Quinc Corey at (704) 373-7245 or myself at (704) 373-4436.

Very truly yours,

/s/ Keith Sipe
B. Keith Sipe
System Environmentalist
Fossil-Environmental
Compliance

QDC/gw

cc: Ogden Gerald, Asst. Chief
NC-DEM Air Quality, Raleigh

EXHIBIT 107

NORTH CAROLINA DIVISION
OF ENVIRONMENTAL MANAGEMENT

Air Quality Action Request

Computer ___

Name	Location	Reg/Co. /Prem. No.
Duke Power Co., Buck Steam Station	E. Spencer, Kowan County	03/80/00004

Contact Telephone

Type Action: CI ___ EE ___ SR ___ PC ___ VE ___ PI ___
Other Permit Renewal

Air Program Status 03 ___ ___ ___ ___
Class AIA Chg _____

Action Requested By:	Address/Phone	Rec'd Date
Mr. E. Keith Sipe, System Environmentalist	(704) 373-4011	3/13/87

Last Insp. Date _____ Action Date 6/3/87

Next Insp. Date _____

Permit # 378685, 378585 Issued 6/8/87 Expires 3/31/92
378485, 378385 Stip. # _____ Met Y/N _____

Recommendations:	Signature	Date
MRO will issue Permit Nos. 3786R5, 3785R3784R3, & 3783R5	Yin-Pong Chang /s/ Yin Pong Chang	6/8/87

Dist: Yellow (Central File) – Blue (Region) – White (Opt.)
Specify /s/ _____

1. Application is for renewal of Permit Nos. 3786R6, 3785R4, 3784R4, and 3783R4 to operate the following coal fired boilers at Buck Steam Station:

Permit No.	ESP Unit No.	Boiler No.	Max. Heat Input (MBTU/hr.)	KSP Surface Area (Sq. Ft.)
3786R4	3	5 & 6	2 x 672	2 x 80,640
3785R4	4	7	672	80,640
3784R4	5	8	1440	152,280
3783R4	6	9	1440	152,280

2. On January 20, 1987, the writer inspected the facility. None of the units were in operation during the inspection. Unit Nos. 3, 4, & 5 are currently in the Plant Modernization Program (PMP) and are not expected to be in operation until 1989. Unit No. 6 will only be operated on a reserve basis. The facility is considered to be in compliance with the applicable regulations.

3. PSD, NSR, NSPS and NESHAP do not apply.

4. Issue Permit Nos. 3786R5, 3785R5, 3784R5, and 3783R5.

/pb

EXHIBIT 13

BEFORE THE SOUTH CAROLINA
PUBLIC SERVICE COMMISSION
COLUMBIA; SOUTH CAROLINA

HEARING #8323 JULY 30, 1985 11:00 A.M.

DOCKET NO. 85-78-E: APPLICATION BY DUKE POWER COMPANY FOR AUTHORITY TO ADJUST AND INCREASE ITS ELECTRIC RATES AND CHARGES.

HEARING BEFORE: THE HONORABLE FRANKLIN E. ROBSON, ADMINISTRATIVE LAW JUDGE, PRESIDING; AND CHAIRMAN FRED A. FULLER, JR., VICE-CHAIRMAN CECIL A. BOWERS, AND COMMISSIONERS HENRY G. YONCE, MARJORIE AMOS FRAZIER, RUDOLPH MITCHELL, CAROLINE H. MAASS, AND GUY BUTLER.

TRANSCRIPT OF TESTIMONY AND PROCEEDINGS
VOLUME 1

* * *

[61] TESTIMONY OF

WILLIAM S. LEE

FOR

DUKE POWER COMPANY

SCPSC DOCKET NO. 85-78-E

Q. PLEASE STATE YOUR NAME, ADDRESS AND YOUR POSITION WITH DUKE POWER COMPANY.

A. My name is William S. Lee. My business address is 422 South Church Street, Charlotte, North Carolina 28242. I am Chairman of the Board and Chief Executive

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	CIVIL NO. 1:00CV1262
DUKE ENERGY CORPORATION,	)	
Defendant.	)	

EXHIBITS IN SUPPORT OF UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT

(Filed Jan. 31, 2003)

* * *

Officer of Duke Power Company, and a registered professional engineer in North Carolina and South Carolina.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY IN THIS PROCEEDING?

A. The purpose of my testimony is to discuss the rate increase that the Company is seeking. We are requesting an increase of 19.87%, or approximately $143 million, based on the test year which is the twelve (12) months ended June 30, 1984. Of this requested rate increase, approximately 84% relates to the cost impact of Catawba Unit 1 coming into commercial operation. These Catawba costs, as well as other increased costs, must be recovered to provide for a fair and reasonable return.

Q. MR. LEE, PLEASE DESCRIBE THE CATAWBA STATION AND TELL US WHEN CATAWBA UNIT 1 WILL GO IN COMMERCIAL OPERATION?

A. The Catawba Station is a two unit nuclear generating station with a capacity of 1145 MW for each unit. The Station is located on the shores of Lake Wylie in South Carolina near Rock Hill. The reactor systems of the Catawba Station are almost identical to the McGuire Nuclear Station, which consists of two units with a

* * *

[65] the most recent order on March 1, 1984, or in any other order which would cause the Company to do anything except complete the construction of Catawba on a timely basis.

Q. MR. LEE, WHAT IMPACT WILL COMMERCIAL OPERATION OF CATAWBA UNIT 1 HAVE ON THE COMPANY'S GENERATING RESERVES?

A. The Company's generating capability, including firm purchases, is 13,782 MW. As this testimony is being written, our forecasted territorial peak for the summer of 1985 is 12,150 MW based on normal weather. This translates into a generating reserve margin of 13.4% before consideration of reserve capability that Catawba Unit 1 will provide. Catawba Unit 1 will add 1,145 MW to our system capability which will raise the reserve margin to 22.9% on paper at the forecasted summer 1985 peak demand.

The Company has an on-going outage requirement for refueling its nuclear units. Further, one of our major fossil units (Belews Creek Unit 1) will be out of service for repairs during the summer of 1985. Considering only the outage at Belews Creek Unit 1 and no other scheduled or unscheduled outages, which experience tells us will occur, our generating reserve margin for the summer peak is forecasted to be only 13.6% after including Catawba Unit 1. Catawba Unit 1 is therefore essential for system reliability in meeting the 1985 summer load.

Q. WHAT WILL BE THE OVERALL EFFECT ON DUKE POWER COMPANY'S SYSTEM RELIABILITY WHEN THE CATAWBA STATION COMES ON LINE?

A. Obviously, when any new generating capacity comes on line, the system reliability will improve. We believe our system reliability will be significantly enhanced for several reasons.

[66] Our oldest coal-fired units still in service and the year of initial service are as follows:

Lee Unit 1	1951
Riverbend Unit 4	1952

Buck Unit 6	1953
Dan River Unit 3	1955

Marshall, which is one of the most efficient coal-fired steam stations in the country, began operation in 1965 and is now twenty years old. Cliffside 5 has been in service for thirteen years, and our newest coal-fired station, Belews Creek, is eleven years old.

In addition, the Company has removed several small coal-fired units from the stated system net capability due to their advanced age (27 to 43 years old) and condition. These units are being placed in a state of extended cold shutdown pending studies of their usefulness for future needs if they should be rehabilitated.

By 1995, 57% of the Company's present fossil steam generating capacity will be 25 or more years old. Due to the relatively geriatric condition of our fossil steam generating units, we believe the addition of the Catawba units will significantly enhance system reliability. We are also encouraged by the performance of our Oconee Nuclear Station, as well as our McGuire Nuclear Station. Nuclear generation carried 56% of the Company's total system load during the calendar year 1984.

We believe that Catawba Unit 1 will perform quite well considering it is a brand new nuclear unit. Our figures in this case include the assumption that Unit 1 will operate at a 60% [67] capacity factor, which was the average for the nation's nuclear units in 1983.

Q. MR. LEE, WHAT IS DUKE'S PROPORTIONATE INTEREST IN THE CATAWBA STATION INCLUDED IN RATE BASE IN THIS CASE?

A. While Duke has title to 25% of Unit 1, the provisions of the interconnection agreements with the joint owners result in the Company's interest being allocated evenly between Units 1 and 2. This results in the Company having a 12.5% operating investment in both Unit 1 and Unit 2. The South Carolina retail portion of Duke's investment in Unit 1, which the Company is including in rate base in this case, is $67.8 million, including nuclear fuel.

Q. WHAT IMPACT DOES CATAWBA UNIT 1 HAVE ON THE REQUESTED RATE INCREASE?

A. There will be operating costs incurred and return required on the company's investment in Unit 1. The Company is also contractually obligated to begin purchasing capacity and energy from the joint owners of the Catawba Station when Unit 1 operates for one hundred (100) hours at full power.

Q. MR. LEE, WHY WILL THE COMPANY INCUR COSTS FOR PURCHASED POWER FROM THE CATAWBA STATION?

A. The Company entered into a series of contracts (the Catawba Agreements) whereby it sold 87.5% of the Catawba Station to its Wholesale customers. Under the Catawba Agreements, we are contractually obligated to purchase capacity and energy from the joint owners over a period of years. This buy-back provision was an essential element necessary to consummate the sale. This feature of the transaction was necessary to make the purchase of Catawba economically feasible for the wholesale customers.

* * *

[89] the sale to PMPA was an absolute financial necessity. Therefore, we proceeded to renegotiate the contract with PMPA.

Q. YOU TESTIFIED PREVIOUSLY CONCERNING THE SAVINGS ARISING FROM CATAWBA, ARE THERE ANY OTHER EFFICIENCIES THE COMPANY HAS ACHIEVED TO HELP IT HOLD DOWN RATE INCREASES?

A. Yes. Each of the six nuclear units Duke has completed have been completed at the lowest cost per kw of any unit completed during that time frame. Duke also has the lowest cost fossil capacity in the country. These benefits are a direct result of Duke's unique ability to design and construct its generating facilities in-house. Duke is the only investor-owned utility in the country which has such a capability.

Not only are our generating units built at the lowest possible cost, our nuclear and coal units also consistently have been the most efficient producers of electricity in the United States. The heat rate we have achieved has been unparalleled in the industry.

These achievements were recently recognized by the Edison Electric Institute, which awarded Duke the Edison Award for 1984. The Edison Award is given annually for "distinguished contribution to the development of the electric light and power industry for the convenience and public benefit of all." Duke was chosen out of the 175 members of the Edison Electric Institute for "superior performance in the design, construction and operation of economical, efficient nuclear power plants, particularly at a time when attention was focused on nuclear plant cost overruns, construction problems and licensing delays."

Finally, the Company is undertaking a program to rehabilitate certain of our older fossil units, representing approximately 997 [90] mw of capacity. These units are no longer reliable because of their age and because their use as peaking units in the past few years has stressed the units, which originally were designed for base load use. The old coal-fired units generally will require repair or replacement of turbine rotors, precipitators and feed water heaters, reinsulation of generator rotors, rewinding of generator stators, retubing of condensers, and many other unit specific refurbishments to make them reliable. We have been operating these units on a "patch and run" basis to avoid major investment in them until McGuire could be completed. Historically, units of this age and condition would be retired and scrapped. We are attempting to rehabilitate the units, however, because we believe that it will be substantially cheaper to rehabilitate them than to build new units as future additions to capacity. We are examining the units to determine at what cost they can be rehabilitated. We hope that many of these units will be able to be rehabilitated at a substantial savings to the retail ratepayers.

* * *

EXHIBIT 18

NORTH CAROLINA UTILITIES COMMISSION

TRANSCRIPT OF TESTIMONY

DOCKET NO: E-7, Sub 391
Vol. 15

DATE July 16, 1985

(2:00-5:30)

[47] CHAIRMAN KOGER: We'll take a five-minute break. Then we'll go to redirect.

(FIVE-MINUTE RECESS)

CHAIRMAN KOGER: We'll come back to order. We'll come back to Duke.

REDIRECT EXAMINATION BY MR. GRIFFITH:

Q Mr. Lee, on cross-examination, you were asked about the retirement dates of the units in the extended coal shut-down program. Do you recall that line of questioning?

A Yes.

Q Would you describe the units that are included in the extended coal shut-down program, and the reasons for their inclusion in it?

A Yes. There are 12 of the units. They include Allen 1, Allen 2, Buck 3, and Buck 4 and 5, Cliffside 1, 2, 3, and 4, Dan River 1 and 2, and Riverbend 6.

These units began to deteriorate, as evidenced by higher maintenance costs, in '81, 82, and '83. And it was realized that to make them available to last into the next century for service, there [48] would have to be major rehabilitation, and the extended coal shut-down study was undertaken.

As a result of that, we find that Allen 1 must have a precipitator replaced. Two of the turbine rotors must be repaired or replaced. We don't know which yet. The feed water heaters need to be replaced. The generator rotor requires reinsulation of the copper, and the boiler has to be modified and upgraded in several areas.

Allen 1 is not available for service and cannot be made available for service.

Allen 2 similarly required replacement of the precipitator. It, too, requires reinsulating of the generator rotor. But in addition, on the generator, the stater must be completely rewound, which means new copper coils, insulation, and the works.

Like Allen 1, it has to have replacement feed water heaters and modifications and upgrading of its boiler. Allen 2 is not available for service at all.

Buck 3 has a condemned generator rotor. By that, it is meant that it is too dangerous to operate under any circumstances. In addition, [49] the generator stater requires rewinding. Rewinding meaning new coils, copper, and insulation. And major replacements of the boiler have to be done at Buck 3. It is not available for service at all.

On Buck 4, again, the generator stater has to be rewound, with new coppper and the associated insulation on the new coils made in the factory and installed in the

field. And the generator rotor must be reinsulated. Major portions of the boiler water walls of the boiler superheater and of the drum circulation system must be replaced.

Also, the condenser tubes must be replaced on the condenser of Buck 4. And this unit is not available for service at all.

On Buck 5, the generator rotor must be replaced due to crack indications in the rotor found by inserting a boroscope inside the hollow rotor shaft and looking at the inside of that forging. And there are indications that tell us that the rotor itself has begun to crack, and we have to replace it.

Major portions of the boiler's water walls, tubes, and the reheater tubes have got to be replaced. [50] Early next year, we're planning additional boroscope examinations of the generator and of the turbine. Buck Unit 5, if not open for these inspections and other repairs, could be made available for limited duty for emergencies only.

Cliffside 1, the condenser must be retubed, and all feed water heaters need to be replaced. And the generator stater has to be rewound. That is, new coils and insulation manufactured and brought and installed in the generator. Cliffside 1, which is 45 years old, is not available for service at all.

Cliffside 2 has the same problems that Cliffside 1 has, but in addition, its generator rotor has to be rewound, in addition to the stater. But like Cliffside 1, requires replacement of the condenser tubes and replacement of all feed water heaters. And Cliffside 2 is not available for service at all.

Cliffside Unite 3. The generator must be rewound. That is, again, new copper coils manufactured and insulated and brought to the field and installed. And the stater of Cliffside – that's the stater. And the rotor of the Cliffside 3 generator [51] must be reinsulated. The shell of the high-pressure turbine is cracked, and it needs to be replaced. That's a very large casting. And all of the feed water heaters must be replaced. Cliffside 3 is not available for service at all.

Cliffside 4, again, requires rewinding of the stater and reinsulation of the rotor, both of the generator, like its sister unit Cliffside 3.

All high-pressure and low-pressure feed water heaters must be replaced. Cliffside 4 is not available for service at all.

Dan River 1 requires replacement of the high-pressure turbine shell – again, that's a casting – and of the turbine rotor. Major portions of the boiler tubes must be replaced. The generator rotor, we've got to either repair or replace some crack indications as found by boroscopy.

Dan River 1 is available for service under extreme emergency conditions.

Dan River 2 is having a new high-pressure shell and a new turbine rotor. The generator rotor is being bored through its middle, to see if we can remove some cracks found by boroscope examination. [52] 'Til we do this, we don't know whether we can save that generator rotor, or whether it must be repaired.

In any event, that generator rotor will have to be reinsulated. Dan River 2 is not available for service at all.

Riverbend 6. There are, again, crack indications in the turbine rotor from borosonic indications. As a result, the manufacturer has recommended severe restrictions on operation of the unit until we know whether we can repair that or have to replace that turbine rotor because of cracks.

The low-pressure feed water heaters have to be replaced, along with major portions of the water wall tubes in the boiler. The generator rotor and the stater must be rewound.

Riverbend 6 is available for service under extreme emergency conditions for only a few times, or we'll lose it altogether.

That completes the report of the status of those twelve units.

Q All right, sir. Do. you know how these units were treated for retirement purposes prior to 1981?

A Yes. It was thought that a number of these units [53] would be retired, and they were in a schedule. In fact, all of them were in sort of schedule.

And I think on cross-examination, it was established that through 1981, our long-range planning department reported to this Commission those units that were scheduled for retirement in the decade thence.

Q All right, sir, did that treatment change after 1981, with respect to the retirement of those units?

A Yes. As I indicated, in '81, '82 and '83, our maintenance estimates were going up very sharply because of

problems like I have just recited to you with respect to those and other units.

It became clear that this group of twelve units would not last until an expected retirement date, but rather had to be taken out of service and rehabilitated in a major way, and therefore, made available to our ratepayers on into the next century.

That was reflected in Mr. W. O. Parker's letter that was cited to me on cross, of November, '82, where he projected that the retirement date for these units would be some time out in the 21st century. I've since talked to Mr. Parker, and [54] he reaffirms my understanding that he was counting on total rehabilitation, or there was no way they could make it that long.

Also, in 1982, we reorganized that area of the company to give more management attention to these problems that were building up in '81 and '82, insofar as keeping these units in service. And we launched in '82 and '83, the study that resulted in the ECS program being approved in early '84.

Q And was that the date that it was implemented?

A Yes.

EXHIBIT 19

DOCKET NO. E-7, SUB 391

BEFORE THE NORTH CAROLINA
UTILITIES COMMISSION

In the Matter of Application by Duke Power Company for Authority to Adjust and Increase Its Electric Rates and Charges	DUKE POWER COMPANY'S PROPOSED ORDER GRANTING RATE INCREASE

Steve C. Griffith, Jr.
Senior Vice President and General Counsel

Ronald L. Gibson
Assistant General Counsel

W. Edward Poe, Jr.
Assistant General Counsel

Duke Power Company
Post Office Box 33189
Charlotte, North Carolina 28242

Clarence W. Walker
Myles E. Standish

Kennedy Covington Lobdell & Hickman
3300 NCNB Plaza
Charlotte, North Carolina 28280

Attorneys for Duke Power Company

August 27, 1985

* * *

has shifted to them a greater portion of the high cost capacity of Catawba, as discussed above.

To summarize our conclusions with respect to the Catawba Sale Agreements, this Commission finds that each of these agreements was prudent when entered into and when restated and amended, and will result in benefits to the North Carolina retail ratepayers. These agreements were necessary to enable Duke to complete Catawba and this Commission approved each of the original agreements. As a result of these agreements, the benefits the North Carolina retail ratepayers are receiving are as follows:

1. Reduced cost of power from the Catawba Nuclear Station to the North Carolina retail ratepayers;

2. Reduced embedded cost of debt and preferred stock to Duke which are being reflected in lower North Carolina retail rates;

3. Avoidance of a portion of the high cost of capacity of Catawba; and

4. Completion of the Catawba Nuclear Station which will provide enhanced system reliability.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 9

The evidence for this Finding of Fact is found in the testimony of Mr. Lee.

Mr. Lee testified that Catawba Unit 1 will cost approximately $1,700/kw, including AFUDC and the cost of common facilities, which is approximately $915/kw less than the cost of the average nuclear unit expected to come into service in 1985 and lower than the cost of any of those

units. Mr. Lee testified that had Catawba Unit 1 been built at the average cost of a nuclear unit, the North Carolina retail ratepayers would have paid over $901 million in additional rates during the next ten years alone. (Tr. Vol. 3, p. 74) Mr. Lee's testimony was uncontradicted.

Mr. Lee also testified that the sales of Catawba were only a financing arrangement which will not affect the flow of electricity whatsoever. Catawba will serve all of Duke's customers in the same manner as any of Duke's plants. The only effect of the Catawba Sale Agreements is who paid for Catawba and how electricity is priced. (Tr. Vol. 3, pp. 86-87) Mr. Lee's testimony was uncontradicted.

Mr. Lee testified that without Catawba, based on Duke's forecasted peak load for the summer of 1985 of 12,150 MW, Duke would have a generating reserve margin of only 13.4%. With Catawba, Duke's generating reserve margin would be 22.9% based on the forecasted summer 1985 peak. Duke's actual reserve margin for the 1985 summer peak will be 13.6% because of an extended outage at Belews Creek Unit 1 this summer. This compares to a recommended *minimum* reserve margin by this Commission of 20%. Mr. Lee also testified that Catawba will substantially. enhance system reliability. Mr. Lee noted that Duke's newest coal-fired plant is 11 years old and certain of Duke's coal-fired units are already more than 30 years old. By 1995, 57% of Duke's fossil system will be 25 or more years old. Therefore, the addition of Catawba Unit 1 will be vital for continued system reliability. (Tr. Vol. 3, pp. 53-54)

Mr. Lee stated in his testimony that the Company's calculated reserve margin did not include 997 MW of capacity which had been placed in extended cold shutdown

(ECS).This capacity consists of 12 small coal-fired units which are 27 to 43 years old. (Tr. Vol. 3, p. 54) These units were placed into extended cold shutdown because they can no longer provide reliable service and because their use as peaking units in the past few years has stressed the units, which originally were designed for base-load use. Mr. Lee stated that the Company's intention was to thoroughly examine the units and determine whether and at what cost they could be rehabilitated. This process will take approximately three years. From initial examinations, Mr. Lee noted that the units would require repair or replacement of turbine rotors, precipitators and feed water heaters, reinsulation of generator rotors, rewinding of generator stators, retubing of condensers and many other unit-specific refurbishments to make them reliable. (Tr. Vol. 3, p. 74) Nine of the 12 units were not available at the time of the hearing for any service whatsoever and the remaining three units were available only in extreme emergency conditions. (Tr. Vol. 15, pp. 47-53) Mr. Lee stated that because of the length of time needed to examine these units and order the necessary equipment and make the necessary repairs, the units would not be able to be brought back into service until the late 1980's or early 1990's, if at all. (Tr. Vol. 8, pp. 75-77; Tr. Vol. 12, pp. 49-51).

The Attorney General cross-examined Mr. Lee concerning the fact that these units were not shown on Duke's retirement schedule from 1982 on. Mr. Lee testified that many of these units had originally been scheduled for retirement in the 1980's and shown on prior retirement schedules but, because of the increasing costs of new units, Duke had taken the units off of the retirement schedule in anticipation that they would be rehabilitated through the extended cold shutdown program. (Tr. Vol. 10, p. 41; Tr.

Vol. 15, pp. 52-54) The Attorney General also cross-examined Mr. Lee concerning the availability of these units in 1983. Attorney General-Lee Cross Examination Exhibit 9 showed that these units were available in 1983 between 59% and 97% of the time. Mr. Lee testified that this showed only the availability of the units for dispatch and reflected the fact that the units were called on infrequently. If the units had been called on more frequently they may not have run and their availability would have been lower. (Tr. Vol. 10, pp. 51-55)

Mr. Lee also testified concerning the summer 1985 peak load forecast of 12,150 MW. Mr. Lee stated that the forecast had been made in September of 1984 for budgetary purposes. It is this short-term forecast made in September of each year upon which the Company plans its budget for the following fiscal year. Mr. Lee stated that a similar forecast is made every year and that this forecast is the most accurate forecast the Company has for the next fiscal year. Mr. Lee testified that this forecast was higher than the previous forecast shown in the Company's previous short-range load forecast because. that forecast was made in 1983. The 1983 forecast was made shortly after the bottom of a recession and incorporated a lower growth rate in the economy than had actually occurred since that time or was expected to occur in the near future. The September 1984 forecast was based upon the more current economic conditions prevailing at that time. Therefore, Mr. Lee testified that the September 1984 forecast was the most reliable forecast for prediction of the summer 1985. (Tr. Vol. 15, pp. 54-56)

This Finding of Fact is also supported by the testimony of Public Staff witness Lam. Mr. Lam testified that Catawba Unit 1 did not represent excess capacity because

even with Catawba Unit 1 and including the units which have been placed in extended cold shutdown, Duke had a reserve margin of only 25.5% based upon the actual winter peak load experienced in January of 1985. Mr. Lam testified that use of Duke's actual peak load was appropriate because the Company has to meet whatever the largest peak is on its system and that naturally occurs, during extreme weather conditions. (Tr. Vol. 24-B, pp. 98-104)

Witnesses for the Attorney General, and CIGFUR and Wells Eddleman, representing himself, testified that Catawba Unit 1 was excess capacity and not needed at this time. Dr. Wilson gave the following reasons for his conclusion that Catawba Unit 1 represented excess capacity: (1) the 997 MW of capacity placed in extended cold shutdown should be included in the calculation of reserves; (2) Catawba was base load capacity coming on at a time when the addition of cycling capacity is more appropriate; and (3) Duke's load forecast made in September 1984 was high in comparison to the 1983 load forecast. (Tr. Vol. 25-B, pp. 85-92)

Dr. Wilson's conclusion that the units placed in extended cold shutdowns should be included in the calculation of reserve margins was based upon the testimony of Attorney General witness Whitfield Russell. (Tr. Vol. 25-B, p. 87) Mr. Russell testified that these units should be included in the reserve margin because they were capable of providing service. (Tr. Vol. 25-A, p. 10) Upon cross-examination, however, Mr. Russell was unable to state when these units could be made available for reliable service. Mr. Russell did not know whether they could be made available for service within a period of two years or longer. (Tr. Vol. 25-A, pp: 69, 89-90, 95-97, 102-103) Mr.

Russell admitted that he had not examined the units placed in extended coal shutdown; rather, Mr. Russell stated that his conclusions were based upon an examination performed by Mr. Walter Gunderson. (Tr. Vol. 25-A, pp. 73, 106) Mr. Gunderson was not offered as a witness by the Attorney General. Duke subpoenaed Mr. Gunderson to testify but that subpoena was not mandatory since it was addressed to Mr. Gunderson outside North Carolina, and Mr. Gunderson did not appear. Mr. Russell testified that the Attorney General had refused to advise Mr. Gunderson whether or not to honor the subpoena. (Tr. Vol. 25-A, pp. 61-62). Mr. Gunderson's report on the extended cold shutdown program was introduced into evidence, however. Mr. Gunderson's report concluded that "[t]he [extended cold shutdown] program, as presently conceived, is a prudent action that is carefully designed to reduce operating costs while retaining operating flexibility; based on the projected Load/Capacity situation in the Duke Control Area." (Russell Exhibit 3).

Mr. Russell also testified that Duke could have rehabilitated the extended cold shutdown units prior to the commercial operation of Catawba Unit 1. On cross-examination, however, he could not state when Duke would have had sufficient capacity to remove these units for the period of time that it would take to rehabilitate them. (Tr. Vol. 25-A, pp. 71-72, 108) Indeed, as discussed above, he had no knowledge concerning the length of time it would take to rehabilitate these units.

Dr. Wilson's conclusion that the addition of cycling capacity rather than base load capacity was more appropriate at this time was based in part on his finding that Catawba Unit 1 could operate only 4,000 hours per year without replacing generation from Duke's Belews Creek

and Marshall units. Dr. Wilson testified that this would have a negative effect because Belews Creek and Marshall are the most efficient coal-fired units in the country. (Tr. Vol. 25-A, p. 90) With respect to this matter, Mr. Lee testified that the conversion of coal-fired units from base load to cycling duty was an inevitable result of the aging process, and this had been the pattern of every coal fired unit Duke had ever built. (Tr. Vol. 10, p. 32)

CIGFUR Witness Falkenberg also testified that Catawba Unit 1 was excess capacity. His conclusion was based upon the assumption that the extended cold shutdown units could provide reliable service. (Tr. Vol. 31, p. 99) Mr. Falkenberg admitted on cross-examination that he had performed no independent analysis of the extended cold shutdown program. Rather, his conclusion that the units could provide service was based entirely upon his reading of Mr. Lee's testimony. (Tr. Vol. 32, pp. 44-45) He acknowledged that he would also accept any testimony Mr. Lee gave at the hearing, but he was unaware that Mr. Lee. testified on redirect examination that the ECS units would be out of service for several years. (Tr. Vol. 32, pp. 45-46) Mr. Falkenberg also stated that he had assumed in his conclusion that a reserve margin of 15% was adequate, and that reserves beyond 15% would begin to be excess. (Tr. Vol. 32, p. 44)

Mr. Eddleman also based his conclusion that Duke had excess capacity on the assumption that the extended cold shutdown units should be included in Duke's reserve margins. Mr. Eddleman also had made no examination of the extended cold shutdown units. Mr. Eddleman contended that these units should have been rehabilitated but he did not state when Duke should or could have rehabilitated these units. (Tr. Vol. 27, p. 203)

Mr. Eddleman also contended that Duke's September 1984 load forecast for the summer 1985 peak was too high. He suggested that the Commission use the forecast prepared by the Carolina Environmental Study Group as well as a forecast prepared by himself which show a 1985 summer peak for Duke in the range of 11,000-11,500 MW. Mr. Eddleman did not state what assumptions contained in Duke's September 1984 forecast were incorrect, however. (Tr. Vol. 27, pp. 204-205)

Finally, Mr. Eddleman testified that Duke has excess base load capacity. He suggested that if Duke needs new capacity it should be cycling or peaking capacity rather than base load capacity. (Tr. Vol. 27, pp. 207-211)

We conclude that it is inappropriate to include the extended cold shutdown units in the calculation of Duke's current reserve margin. First, Mr. Lee's testimony concerning the condition of these units is uncontradicted. It is clear to this Commission that these units cannot provide reliable service until major repairs can be performed which will take a number of years. It would be inappropriate to include in Duke's reserve margins plants which cannot run and will not be able to run for a number of years. Second, we conclude that the only way that these units can be rehabilitated so as to extend their life for a number of years is through a comprehensive program such as the extended cold shutdown program. Ordinarily, plants of this age and condition are retired and replaced by new capacity. If this program can successfully rehabilitate these units, the units will be able to replace expensive new capacity which otherwise would have to be built. Therefore, we find, as did the only expert employed by any of the intervenors to examine the condition of these units, Mr. Walter Gunderson, that the extended cold shutdown

program is prudent and designed to minimize costs to the retail ratepayers. This Commission notes that any decision which it would make that would discourage such a program would not be in the best interests of the retail ratepayers because over the long term it would increase costs by forcing the utilities to run older units until they cannot be rehabilitated and thus force utilities to build new capacity rather than rehabilitating older, lower cost capacity.

This Commission also concludes that Duke's September 1984 forecast of its summer 1985 peak of 12,150 MW is the appropriate forecast to use in determining Duke's reserve margin for the summer of 1985. That forecast is based, upon the most recent information available to Duke at the time at which it was made and is based upon the economic conditions likely to prevail during the period of time it covers. No party has shown any invalid or improbable assumptions which were included in the September 1984 forecast.

With respect to the contention that Catawba Unit 1 represents excess base load capacity, we note that even Dr. Wilson admits that Catawba Unit 1 may be able to run with a capacity factor of almost 50% without displacing generation from Duke's Marshall or Belews Creek Units. The average capacity factor in the United States of a unit of comparable size to Catawba Unit 1 is only 57% and thus the amount of generation displaced from Marshall and Belews Creek is likely to be minimal. Furthermore, we note that the conversion of base load coal units to cycling duty is a natural result of the aging of such units. The running costs of nuclear units such as Catawba Unit 1 are substantially below the running costs of any coal-fired unit, including Marshall and Belews Creek.

Therefore, this Commission concludes that none of the parties has presented competent evidence to support their position that Catawba Unit 1 represents excess capacity and we find that Catawba Unit 1 is needed. We note that this Commission in its April 1985 "Analysis for Long Range Needs for Expansion of Electric Generation Facilities in North Carolina" found that Duke's construction schedule, which included Catawba Unit 1 coming on line in 1985, would not result in excessive reserve margins. Nothing has changed since that time which would cause us to change our minds.

We think it is also important to note here that all of the intervenors who have alleged that Duke has excess capacity appear to base this conclusion in part upon an assumption that Duke should have at all times only a hypothetical optimum reserve margin. This Commission has recommended a *minimum* reserve margin of 20%. This Commission has never stated that a utility should have a reserve margin of no more than 20%. In fact, just the opposite is true. This Commission has repeatedly recognized in its Analysis of Long-Range Needs for Electric Generating Facilities in North Carolina that forecasting electricity needs for many years into the future is at best imprecise and that the long lead times required to bring capacity on line makes planning difficult. We have also recognized that planning for future electric consumption can vary within a range of forecasted values. Furthermore, we have recognized that the addition of large base load units such as Catawba Unit I will inevitably have a major impact on a utility's reserve margins. Finally, Catawba Unit 1 has been under construction for more than twelve years. To be able to predict its need that long into the future and come as close to the minimum reserve margin

is certainly a commendable accomplishment. It is not the position of this Commission that a utility can recover the costs of a unit when it comes into service only if, in hindsight, that unit results in optimum reserve levels at the precise time it comes into service. Such a policy would penalize utilities for prudent decisions and would discourage investment in new generating facilities necessary for continued growth in this State which is contrary to the policies of this Commission and of this State.

* * *

EXHIBIT 21

NORTH CAROLINA UTILITIES COMMISSION

TRANSCRIPT OF TESTIMONY

DOCKET NO. E-7, Sub 408

DUKE ROWER COMPANY

Volume 5

DATE September 3, 1986

CONFIDENTIAL
2LL 0000136

[32] Q. MR. LEE, IN DOCKET NO. E-7, SUB 391, YOU DESCRIBED THE EXTENDED COLD SHUTDOWN (ECS) PROGRAM INVOLVING SEVERAL OLD FOSSIL GENERATING UNITS. WHAT IS THE CURRENT STATUS OF THE ECS PROGRAM?

A. I testified in our last case that in March 1984 we began our Extended Cold Shutdown program. We removed from service twelve small coal-fired units, ranging in age from 27 to 43 years, which totaled 997 MW of capacity. These units were placed in extended cold shutdown because they could no longer provide reliable service as a result of their age and condition. Rather than retire the units, we adopted the ECS program to rehabilitate them and extend their lives.

When we began removing these units from service in March 1984, we placed them in protected shutdown status while we performed plant evaluations and upgrade and reliability studies to determine precisely the work that

needed to be done, and organized ourselves to accomplish that work. We are now well under way toward modernizing these units. In fact, we completed the major work on Dan River Unit 2 and returned it to service in January 1986. This work at Dan River Unit 2 included replacement of the turbine high pressure rotor and shell, boresonic analysis and overbore of the generator rotor, and rehabilitation of the boiler economizer, superheater and wall tubes. Dan River Unit 2 has returned to service with extended life.

Because we have changed the emphasis of our effort from protection to refurbishment, we have changed the name of the program from ECS to Plant Modernization Program (PMP). The new name more accurately describes where we are in the process.

[33] At the present time we have completed the detailed upgrade studies at Dan River and at the Allen Steam Station. We made a decision to evaluate all of the units at the various stations while we had the evaluation teams on site. This detailed evaluation of all units will be helpful to us currently as we maintain those units that are in service.

During 1986 the major PMP work will be at Dan River 1, Buck 5, Riverbend 6, and Allen 1. Dan River 3 was placed in the PMP program in January, 1986. Although the upgrade studies have not been completed at each of these units, we are proceeding with certain work that is identified in unit evaluations and is generally common to each unit, including, as necessary, turbine high pressure rotor and shell replacement, boresonic analysis, generator and turbine rotor overbore, boiler tube rehabilitation, and precipitator and feedwater heater replacement.

We are continuing to do the bulk of this work with our own employees, and expect the overall cost of refurbishing the PMP units to be $200-300 per kilowatt. We expect to gradually return additional units to service as the refurbishments are completed.

We are unable to state precisely when the refurbishment work can be completed on each unit. Many of the parts and equipment needed in the refurbishment must be manufactured specifically for the units. This requires lead times ranging from several months for some items, to as much as 36 months for major components like a new rotor. In addition, we are doing this refurbishment work with Duke employees, which we believe is the most cost-effective method.

[34] The obvious benefit of PMP is that we add capacity at very reasonable cost. But there is another very important benefit that will become increasingly important in the years ahead. The Duke coal-fired capacity is aging. Our Marshall Station is now 20 years old and Belews Creek, our newest, is already 11 years old. By 2000, all of our coal-fired capacity will be more than 25 years old. Our employees are learning a great deal from the present refurbishment and life-extension efforts which will help us maintain our other units better, and will also make us ready to meet the future challenge of extending the life of other units on a cost effective basis.

Q. MR. LEE, YOU HAVE TESTIFIED IN THE PAST ABOUT THE EFFECT OF COST OF SERVICE SAVINGS AND THE COMPANY'S EFFICIENCY ON RATES. IS THE COMPANY CONTINUING ITS EFFORTS TO REDUCE COST OF SERVICE AND OPERATE EFFICIENTLY?

A. Yes. I have previously stated that our rates are low compared to other utilities, reflecting the efficiencies we have achieved in the past. I testified in the last case that in 1984 our employees operated the most fuel-efficient, coal-fired power plants in the country for the eleventh year in a row. Industry statistics for 1985 are not yet available, but our coal-fired stations improved in efficiency in 1985 over 1984. In fact, for 1985 our coal-fired stations exceeded the national efficiency record which was set by Duke Power in 1976. I expect we will learn that our 1985 fossil performance efficiency set a new all-time record for the United States, which is a remarkable achievement with machinery ranging from 11 to 38 years old, and a tribute to the outstanding efforts of the Duke people who did it.

* * *

EXHIBIT 22

February 1, 1985

Memorandum for File

Subject: Fossil Units – Extended Cold Shutdown

During 1984 a management decision was made to remove 12 older coal-fired units from Duke's stated system net capability because of their age (27-43 years) and condition. An evaluation and decision is to be made at a later time if and when it will be cost effective to bring these units back into service. Planning must encompass necessary plant modifications and maintenance to make these units reliable if they return to service.

Effective 12:01 a.m. March 1, 1984, the following small coal-fired units are removed from the stated system net capability:

Unit	Age	Net Capability
Buck Unit 3	42 yrs.	70MW
Buck Unit 4	41 yrs.	38MW
Buck Unit 5	31 yrs.	128MW
Cliffside Unit 1	43 yrs.	38MW
Cliffside Unit 2	43 yrs.	38MW
Cliffside Unit 3	35 yrs.	61MW
Cliffside Unit 4	35 yrs.	61MW
Dan River Unit 1	34 yrs.	65MW
Dan River Unit 2	33 yrs.	65MW
Riverbend Unit 6	29 yrs.	133MW
Allen Unit 1	27 yrs.	150MW
Allen Unit 2	27 yrs.	150MW
Total Fossil Production		997MW

Effective December 31, 1984, book cost and additions of the above units were transferred from Account 101 – Plant in Service to Account 105 – Plant Held for Future Use.

The dollar amount moved was $135,052,961. For accounting clarity, the associated depreciation reserve was moved to a separate account. Moving these dollars had no impact on rate base since the units were fully depreciated. However, annual depreciation expense has been reduced by $4,821,391.

As of this date, procedures have been developed, some equipment purchased and installed to commence implementation of a comprehensive extended cold shutdown program. Management is confident the program, which has been developed and demonstrated on the first units, represents a cost effective approach to preserving future options for these small coal-fired units.

/s/ H.D. Whitley
H.D. Whitley

HDW/mdh

EXHIBIT 23

Duke Power Company
Fossil Production Department
Plant Modernization Project
Project Review
April 24, 1989

I. PMP Philosophy

II. Schedule Review and Status

III. Cost Review

- Projections
  - PMP Total
  - Buck 3 & 4/Cliffside 1-4
  - Specific Equipment
  - Break even Capital Cost
  - Spent to Date

IV. Capacity Factors

- Buck 3 & 4/Cliffside 1-4

V. Discussion

Duke Power Company
Fossil Production Department
Plant Modernization Project
PMP Philosophy

Purpose

To conduct maintenance and upgrade to selected fossil generating units so that they operate safely, reliably and cost effectively for an additional 20 years.

Plan/Criteria

- Removed from stated capacity – not available for dispatch
- Protect against further deterioration
- Maintain, review and update major work activities list periodically
- Accomplish work activities which:
  - are cost effective
  - have impact on availability (target 80-85%)
  - replace worn out, obsolete equipment
  - improve operability
  - meet regulatory requirements
  - are necessary before the next major outage
- Schedule work to levelize resources
- Delay expenditures as late as possible
- Capitalize all expenditures

Duke Power Company
Fossil Production Department
Plant Modernization Project

Schedule	Review		
March	1984	-------	Twelve units placed into extended cold shutdown
June	1984	-------	Scheduled all units to return to service prior to 1992

January	1986	- - - - - - - -	Returned Dan River 2 to service; place Dan River 3 into PMP
April	1986	- - - - - - - -	Revised schedule to return all units to service prior to 1994
October	1986	- - - - - - - -	Placed Riverbend 7 into PMP
January	1987	- - - - - - - -	Returned Dan River 1 to service
August	1987	- - - - - - - -	Placed Riverbend 4 into PMP
April	1988	- - - - - - - -	Revised schedule to return all units to service prior to 1992

Schedule – Near Term

June	1989	- - - - - - - -	Return Dan river 3 to service
October	1989	- - - - - - - -	Return Allen 2 to service (available 08/89)
June	1990	- - - - - - - -	Return Allen 1 to service
June	1990	- - - - - - - -	Return Riverbend 4 to service

EXHIBIT 25

February 13, 1986

TO: W. H. Owen
J. M. Hart
R. W. Bostian
R. L. Dick
G. W. Grier
R. B. Priory
R. J. Osborne

SUBJECT: Plant Modernization Project Strategy Statement

We have revised the PMP Strategy Statement to read as follows:

> The Plant Modernization Project includes the rehabilitation and upgrading of thirteen (13) coal-fired units totaling approximately 1,000 megawatts capacity. The modification will be completed during the next approximate six years with selected unites returned to service as the work is completed. The extended operating life of the rehabilitated units is a cost-effective alternative to the addition of new capacity. The PMP provides reliable and efficient generating capability from older and smaller units that are returned to service in increments to increase our system generating capability. Several modifications will enable the PMP units to better accommodate the cyclic duty they will experience during their remaining operating life.

/s/ William O. Parker, Jr.
William O. Parker, Jr.

MHG:kk

cc: G. O. Managers
Station Managers

EXHIBIT 26

DUKE POWER COMPANY

DIRECT TESTIMONY

NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-7, SUB 487

APRIL 12, 1991

TESTIMONY OF

WILLIAM S. LEE

FOR

DUKE POWER COMPANY

NCUC DOCKET NO. E-7, SUB 487

Q. PLEASE STATE YOUR NAME, ADDRESS AND YOUR POSITION WITH DUKE POWER COMPANY.

A. My name is William S. Lee. My business address is 422 South Church Street, Charlotte, North Carolina 28242. I am Chairman of the Board and President of Duke Power Company and a registered professional engineer in North Carolina and South Carolina.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY IN THIS PROCEEDING?

A. The purpose of my testimony is to discuss the rate increase that we are seeking and certain other matters which are of importance to the Commission. We are seeking an increase of 9.2%, or approximately $223 million, based on the test year which is the twelve months ended December 31, 1990. Of this requested increase, about 6% relates to the inclusion of the cost of the Bad Creek Hydroelectric Station in our rates. The remainder is caused by a number of other cost increases which have

occurred since 1985, the test year of our last general rate increase. These costs must be reflected in our electric rates if the Company is to have a reasonable opportunity to earn a fair and reasonable return on investment.

Q. MR. LEE, PLEASE OUTLINE YOUR TESTIMONY.

* * *

[5] Duke has also continued its plant modernization program. This is a program for our older coal fired units which was begun in 1985 to allow those units to operate well beyond their expected retirement at the end of their initial design life. Since January 1, 1987, we have brought back on line five units with a generating capacity of 618 MW. This capacity has been brought back with an average additional investment of $164 per kw, a small fraction of the cost to build a new coal-fired plant today. We expect to bring back additional units in 1991.

We have also increased our demand side efforts to lower the rates of growth in our peak demand and to promote off-peak sales. These efforts have slowed the peak demand growth we otherwise would have experienced and enabled us to avoid the addition of new generating facilities for five years in a service territory which has experienced continued economic growth. These efforts also allow us to spread our fixed production costs over a greater number of kwhs. An example of our efforts to promote off-peak sales is a recent sale of a heat Recovery Opportunity system to one of Duke's textile customers. This system will substantially increase the customer's heat recovery process, lower waste water discharge temperatures and save the customer over $20,000 each year. It will also provide

Duke with 572,000 additional kwhs of sales each year, mostly during non-peak hours.

* * *

EXHIBIT 40

PROJECT OUTAGE TABLE
Boiler Work over $500,000

Project	Unit Put Into ECS for PMP	Not Available for Dispatch per GADS	Boiler Work
AS 5 2000		01/15/00 - 05/14/00	01/15/00 - 05/14/00
AS5 1996		04/18/96 - 06/21/96	04/18/96 - 06/21/96
AS4 1996		01/26/96 - 04/12/96	01/26/96 - 04/12/96
AS4 1998		08/29/98 - 01/19/99	08/29/98 - 01/19/99
AS2 1988 (PMP)	03/01/84 (ECS)	04/05/85 - 04/25/89	06/22/97 - 03/02/89[1]
AS1 1989 (PMP)	03/01/84 (ECS)	03/28/85 - 08/13/90	Jan. 1989 - Dec. 1989[2]
BC2 1999		02/26/99 - 05/19/99	02/26/99 - 05/19/99
BC2 1996		01/27/96 - 04/10/96	01/27/96 - 04/10/96
BC1 2000		02/11/00 - 05/19/00	02/11/00 - 05/19/00

[1] *See* Bates No. BL-4 0002614; BL-4 0002748.

[2] *See* Bates No. 30B5R(1) 0007070.

BK5 1991 (PMP)	03/01/84 (ECS)	10/01/85 - 06/01/91	10/07/85 - 09/11/86[3] 04/04/89 - 12/27/89[4]
BK4 1994 (PMP)	03/01/84 (ECS)	10/09/83 - 11/01/94	07/23/92 - 07/05/94[5]
BK3 1994 (PMP)	03/01/84 (ECS)	01/01/84 - 07/01/94	03/18/92 - 02/01/94[6]
MS4 1990		10/08/90 - 12/22/90	10/08/90 - 12/22/90
MS3 1999		09/04/99 - 12/10/99	09/04/99 - 12/10/99
MS2 1989		08/16/89 - 01/03/90	08/16/89 - 01/03/90
MS2 1996		09/20/96 - 11/27/96	09/20/96 - 11/27/96
CS2 1993 (PMP)	03/01/84 (ECS)	07/15/84 - 02/01/94	05/20/91 - 06/07/93[7]
CS3 1990 (PMP)	03/01/84 (ECS)	03/28/85 - 12/02/91	01/02/90 - 08/27/90[8]
CS4 1990 (PMP)	03/01/84 (ECS)	03/28/85 - 04/09/91	10/29/90 - 1/31/91[9]

[3] *See* Bates No. BK 0033150; BK 0033151.

[4] *See* Bates No. BK 0037406.

[5] *See* Bates No. BK 0015609; BK 0015607.

[6] *See* Bates No. BK 0011854; BK 0011907.

[7] *See* Bates No. BL-1 0003034; BL-1 0003016.

[8] *See* Bates No. BL-6 0006983; BL-6 0007018.

[9] *See* Bates No. BL-2 0011877.

CS5 1992/1995		04/04/92 - 05/27/92 03/26/95 - 06/08/95	04/04/92 - 05/27/92 03/26/95 - 06/08/95
CS1 1993 (PMP)	03/01/84 (ECS)	10/02/84 - 06/01/94	03/03/92 - 11/29/93[10]
DR3 1988 (PMP)	01/01/86 (PMP)	10/30/85 - 04/19/89	Jan. 1988 - Feb. 1989[11]
AS3 1994		08/26/94 - 12/07/94	08/26/94 - 12/07/94
LS3 1989/1990		09/28/89 - 06/17/90	09/28/89- 06/17/90
RB4 1990 (PMP)	08/01/87 (PMP)	11/01/87 - 05/11/90	07/19/88 - June 1989[12]
RB6 1991 (PMP)	03/01/84 (ECS)	09/23/85 - 06/18/91	12/21/88 - 1/18/91[13]
RB7 1992 (PMP)	10/01/86 (PMP)	10/21/86 - 08/01/92	01/23/90 - 08/29/91[14]
BK6 1990		09/04/90 - 10/15/91	09/04/90 - 10/15/91
MS1 1992		10/05/92 - 12/23/92	10/05/92 - 12/23/92

[10] *See* Bates No. GO13 0000827; BL-1 0003016.

[11] *See* Bates No. 30B5R(1) 0007071.

[12] *See* Bates No. GO12 0003048; RB0013656.

EXHIBIT 57

DUKE POWER COMPANY
TRAINING AND REFERENCE GUIDE

FOSSIL ENVIRONMENTAL COMPLIANCE

VOLUME 2
AIR QUALITY

[LOGO]

SEPTEMBER 30 – OCTOBER 1, 1991

NEW SOURCE REGULATION

Confidential
BK 0000913

Legislative Background:

- Clean Air Act Amended in 1977 and 1979.
- Two Key Requirements Affecting Emission Sources
  - New Source Performance Standards (NSPS)
  - Prevention of Significant Deterioration (PSD)
- Purpose: Preserve Air Quality Better Than NAAQS
- Rationale:
  - Environmental Protection Should Be Considered As Part of Business Decisions To Build New Or Expanded Facilities.
  - Contrast Existing Facilities: Decision To Build Made In Good Faith In Absence Of Control Requirement.

Requirements for NSPS:

- Technology-Based Standards
- Standard Is Minimum Acceptable Technology For New Sources (PSD May Supercede)
- Triggered By:
  - Construction of New Source
  - Reconstruction of Existing Source (50% Rule)
  - Modification of Existing Source Which Increases Hourly Emissions At Maximum Load
- Standards For Most Major Industrial Processes: 40 CFR 60, Attachment 2
- Potential Duke Sources At Fossil Stations:
  - Fossil-Fired Utility Boilers
  - Industrial Boilers > 100 mBtu/hr (Auxiliary Boilers)
  - Combustion Turbines

Requirements for PSD:

- Ambient Air Quality Standard: Sets Increment For Maximum Allowable Deterioration/ Restricts Growth
- Based On:
  - Annual Emissions From Facility
  - Net Emissions Increase (Contemporaneous Reductions Will Help).

- New Or Modified Emissions Sources Subject To "Best Available Control Technology" (BACT) Review

New Sources In Non-Attainment Areas:

- No New Emissions Source Allowed Without Offsets From Existing Sources (For the Non-Attainment Pollutant)
- Source Must Install Lowest Achievable Emission Rate (LAER) Technology

* * *

II.
EVALUATING PLANT MODIFICATIONS/ RECONSTRUCTION THAT COULD TRIGGER NSPS AND/OR PSD REQUIREMENTS

A. Contact fossil Environmental Compliance (FEC) for support in evaluating New Source Performance Standards (NSPS), Prevention of Significant Deterioration (PSD), and notification requirements BEFORE. . . .

1. Making ANY physical or operational changes that increase emission rates or annual emissions of national ambient air pollutants (SO_2, NO_x, particulate, VOC (in ozone non-attainment areas) etc.) to the atmosphere.

   a. Add a new permittable source

   b. Modify a permitted source

      – increase maximum permitted heat inputs – replace an exempt fuel-burning source with a larger one (NC: >100 mmbtu/hr) that requires a permit

- increase use of permitted fuels by modifying
    - air supply/exhaust fans
    - burner arrangements
    - increased mail capacity

c. Modify/Replace permitted air cleaning system rendering it less efficient and/or different system from that permitted

- decreased plate surface area
- alter hopper baffle design (e.g. Allen 3, 4, and 5; Marshal 3 and 4)
- use of unpermitted abatement system or component (ex. Allen 3, 4, 5 cold-side)

d. Use of unpermitted fuels (see air toxics section IV)

2. Plant reconstruction (replacement of components) such that fixed capital cost of replacement components exceeds 50% of capital cost required for a comparable new facility.

a. Rebuild auxiliary boiler that is > 100mmbtu/hr

b. Replace existing CT components

B. Modifications EXEMPTED from NSPS

1. Routine maintenance, repair and replacement that does not expand the facility

2. An increase in the production rate accomplished w/o a capital expenditure

3. Increased hrs of operation

4. Use of an alternative fuel provided the facility was designed to accommodate this fuel before NSPS standards

5. Replacement/addition of an air abatement system that is equally or more beneficial to air quality

C. How to protect an existing station's exemptions from NSPS and PSD requirements?

NSPS:

1. EPA will evaluate a units maximum emissions over the past 5 yrs.

2. Duke should demonstrate/document that a unit has been capable of its maximum capability to avoid loosing capacity.

   a. Recommend station conduct annual review/documentation of actual vs. maximum design capacity.

   b. Recommend short-order repair of damaged, deteriorating equipment as indicated from annual reviews.

PSD:

1. A PSD review is triggered if annual emissions increase due changes in the unit:

   a. an increase in the maximum net dependable capacity of the unit

      - dispatcher operates the unit at a higher load

      - unit operated more frequently

b. PSD not triggered by an increased generating (w/o any changes to unit)

EXHIBIT 73

[LOGO] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF AIR AND RADIATION

(Filed Sep. 9, 1988)

MEMORANDUM

SUBJECT: Applicability of Prevention of Significant Deterioration (PSD) and New Source Performance Standards (NSPS) Requirements to the Wisconsin Electric Power Company (WEPCO) Port Washington Life Extension Project

FROM: Don R. Clay, Acting Assistant Administrator for Air and Radiation (ANR-443) [/s/ DNY]

TO: David A. Kee, Director
Air and Radiation Division, Region V

This is in further response to your March 25, 1988 memorandum requesting guidance on PSD applicability regarding the proposed renovation of the Port Washington Power Plant by the WEPCO. I have also addressed the question whether the renovations proposed for this facility would subject the individual units to Subpart Da of the NSPS.

Based on the information presented in your memorandum, subsequent written information received from WEPCO, information provided by the State of Wisconsin, and other information contained in the Environmental Protection Agency's (EPA's) files on this matter, I have concluded that, as proposed, this renovation project would

not come within the PSD and NSPS Exclusions for routine maintenance, repair, and replacement, nor the exclusions for increases in production rate or hours of operation. It also appears that the project would increase emissions within the meaning of these two programs. Thus, the renovation project likely would be subject to PSD review as a major modification of an existing stationary source and that the renovations proposed for units, 1-5 at this facility probably would subject the individual units to Subpart Da of the NSPS as a modification. However, WEPCO has not yet requested EPA to make an applicability determination. In any case, it would not be possible to make final applicability determinations at this point, for three basic reasons.

First, EPA must be supplied sufficient data regarding the various pollutants emitted by the Port Washington facilities to determine, on a pollutant-specific basis, how the proposed renovations would affect emissions levels. Second, WEPCO might avoid both PSD and NSPS applicability by adding or enhancing pollution control equipment, or in the case of PSD, restricting operations below maximum potential such that the emissions increases necessary to trigger applicability would not occur. The WEPCO should discuss its plans in this regard with EPA. Third, regarding NSPS applicability to unit 1, additional information is necessary to determine whether a physical or operational change would occur.

Thus, although this memorandum will serve to answer many of the questions necessary to reaching final determinations, you should advise WEPCO that ultimately applicability depends upon changes in emissions after the renovations and whether the company decides to take the steps which would enable it to lawfully avoid

coverage. Also, NSPS coverage of unit 1 can only be determined after an evaluation of the additional information regarding the work to be performed. In addition, as to NSPS, WEPCO should be advised to submit a formal request pursuant to 40 CFR 60.5 if it desires a final applicability determination.

As the need for further factual development here suggests, determinations of PSD and NSPS applicability are fact-specific, and must be made on a case-by-case basis. This memorandum provides a framework for analyzing the proposed changes at Port Washington and gives EPA's views on relevant issues of legal interpretation. It should also be useful in assessing other so-called "life extension" projects in the future. However, any such project would need to be reviewed in light of all the facts and circumstances particular to it. Thus, a final decision regarding PSD and NSPS applicability here would not necessarily be determinative of coverage as to other life extension projects.

If you have any further questions regarding the discussion or conclusions in this memorandum, please have your staff contact David Solomon of the New Source Review Section at FTS 629-5375.

I. Background

As mentioned in your March 25 request, the five coal-fired units at Port Washington began operation in 1935, 1943, 1948, 1949, and 1950, respectively. Each unit was, initially rated at 80 megawatts electrical output capacity. In recent years, however, the performance of the units began to deteriorate due to age-related degradation of the physical plant. In particular, inspections performed by a

WEPCO consultant in 1984 revealed extensive cracks originating from the internal surfaces of the rear steam drums and boiler bank boreholes in units 2, 3, 4, and 5, creating significant safety concerns. Because of these safety concerns and other age-related problems, in 1985 the operating levels of units 2, 3, and 4 were reduced, and unit 5 was removed from service. As a result of the plant's deteriorating condition, the maximum rated physical capacities of units 1, 2, 3, and 4 at this time are 45, 65, 75, and 55 megawatts, respectively.

The life extension project includes extensive capital improvements to the common facilities and each of the individual units, including replacement of the rear steam drum in units 2, 3, 4, and 5. The renovation work will restore the physical and operational capability of each unit to its original 80 megawatt nameplate capacity, and extend the useful life of the units well beyond the planned retirement dates that would otherwise apply. Upon completion of the project, WEPCO intends to substantially increase the actual operations at the Port Washington plant.

II. PSD Applicability

The life extension project at Port Washington is subject to preconstruction review and permitting under the Act's PSD provisions if it is a "major modification" within the meaning of the Act and EPA's regulations., The PSD regulations at 40 CFR 52.21 govern this determination because Wisconsin has been delegated PSD permitting authority under the provisions of 52.21(u). The definition of "major modification" in 52.21(b)(2)(i) requires an analysis of several factors. These factors may be

grouped under two general questions. Will the work entail a "physical change in or change in the method of operation of a major stationary source"? If so, will the change "result in a significant net emissions increase of any pollutant subject to regulation under the Act" [see 52.21(b)(2)(i)]? The Port Washington facility is an existing major stationary source because it emits well in excess of the PSD threshold amount for several pollutants.

A. Physical Change or Change in the Method of Operation

This requirement of a major modification is satisfied if either a physical or operational change would occur.

1. Physical Change

The renovation work called for under the proposed life extension project at Port Washington would constitute a "physical change" at a major stationary source. The clear intent of the PSD regulations is to construe the term "physical change" very broadly, to cover virtually any significant alteration to an existing plant. This wide reach is demonstrated by the very narrow exclusion provided in the regulations: other than certain uses of alternate fuels not relevant here, only "routine maintenance, repair and replacement" is excluded from the definition of physical change [see 52.21(b)(2)(iii)(a)].

In determining whether proposed work at an existing facility is "routine," EPA makes a case-by-case determination by weighing the nature, extent, purpose, frequency, and cost of the work, as well as other relevant factors, to arrive at a common-sense finding. In this case, all of these factors suggest that the work required under WEPCO's life

extension project appears not to be "routine." The available information indicates that the work proposed at Port Washington. is far from being a regular, customary, or standard undertaking for the purpose of maintaining the plant in its present condition. Rather, this is a highly unusual, if not unprecedented, and costly project. Its purpose is to completely rehabilitate aging power generating units whose capacity has significantly deteriorated over a period of years, thereby restoring their original capacity and substantially extending the period of their utilization as an alternative to retiring them as they approach the end of their useful physical and economic life. The most important factors that would support these conclusions are outlined below.

a. The project would involve the replacement of numerous major components. The information submitted by WEPCO shows that the company intends to replace several components that are essential to the operation of the Port Washington plant. In particular, as noted above, WEPCO would replace the rear steam drums on the boilers at units 2, 3, 4, and 5. According to WEPCO, these steam drums are a type of "header" for the collection and distribution of steam and/or water within the boilers. They measure 60 feet long, 50.5 inches in diameter, and 5.25 inches thick, and their replacement is necessary to continue operation of the units in a safe condition. In addition, at each of the emissions units, WEPCO plans to repair or replace several other integral components, including replacement of the air heaters at units 1, 2, 3, and 4. The WEPCO also plans to renovate major mechanical and electrical auxiliary systems and common plant support facilities. The WEPCO intends to perform the

work over a 4-year period, utilizing successive 9-month outages at each unit.

In its July 8, 1987 application for authority to renovate to the Public Service Commission of Wisconsin (PSC), WEPCO described the life extension project and explained its purpose and necessity. The WEPCO took care to distinguish the proposed renovation work from routine maintenance that did not require PSC approval, explaining that:

> . . . [work items] falling into the category of repetitive maintenance that are normally performed during scheduled equipment outages do not require specific commission approval and, accordingly, are not included in this application.

Thus, WEPCO's own earlier characterization of this project supports a finding that the planned renovations are not routine.

b. The purpose of the project is to significantly enhance the present efficiency and capacity of the plant and substantially extend its useful economic life. In its application to the PSC, WEPCO pointed out that due to age-related deterioration, total plant capability had declined by 40 percent. The company noted that the currently planned retirement dates for the Port Washington units, as set forth in its Advance Plan filed with the State, ranged from 1992 to 1999. However, WEPCO asserted that "extensive renovation of the five units and the plant common facilities is needed if operation of the plant is to be continued." In any event, WEPCO stated that the renovation work would allow the Port Washington plant to generate power at its designed capacity until the year 2010, and thus "represents a life extension of the units."

In contrast, in its July 29, 1988 letter to EPA headquarters (pages 9-13), WEPCO characterized the renovation work as the timely, routine correction of equipment problems – principally, the steam drum cracks. However, the information presented leads to the conclusion that this is not the case. While replacement of the steam drums is necessary to restore lost generating capacity, that is not the only work proposed to be done. Based upon maximum capacity figures for past years, it appears that the units had experienced deterioration in physical generating capacity even prior to the discovery of the steam drum cracks in 1984. Thus, WEPCO proposes a wide-ranging project encompassing a broad array of tasks that would not only correct the steam drum problem, but correct other age-related deterioration that is essentially independent of the steam drums. Such other work (e.g., replacement of air handlers) apparently is also necessary as a practical matter to restore original nameplate capacity. Thus, it appears that even if WEPCO had undertaken this renovation work immediately following discovery of the steam drum cracks, it would have been proper to characterize the proposed work as a nonroutine life extension project.).[1]

c. The work called for under the project is rarely, if ever, performed. The WEPCO's application to the PSC

[1] It is important to note in this regard that not all renovation, repair, or "life extension" projects would properly be characterized as modifications potentially subject to PSD and NSPS. For example, nonroutine repairs to correct unexpected equipment outages, even of major components such as steam drums, would not be subject to NSPS if they did not increase the maximum capacity of the affected facility as it existed prior to the outage. Conversely, undertaking a program of repair and maintenance properly characterized as routine would not subject a facility to the Act's requirements.

asserted that the work to be performed under the life extension project was not frequently done:

> Generally, the renovation work items included in this application are those that would normally occur only once or twice during a unit's expected life cycle.

The EPA asked WEPCO to submit information regarding the frequency of replacement of steam drums, the largest category of work item called for under the project. WEPCO reported that to date, no steam drums have ever been replaced at any of its coal-fired electrical generating facilities. WEPCO did point out that it had replaced other "headers" comparable in design pressure and function. However, the largest of these was 16 inches in diameter, and EPA does not believe that they are comparable in diameter, wall thickness, function, or importance to the rear steam drums at Port Washington.[2]

d. The work called for under the project is costly, both in relative and absolute terms. The latest information supplied by WEPCO is that the renovation work at Port Washington will cost $87.5 million, of which at least $45.6

[2] The WEPCO's July 29, 1988 letter to EPA stated (on page 13) that after further investigation, the company "learned of several examples" of steam drum failure and replacement. However, WEPCO provides no further details, other than noting that in one instance, the drum failed during initial testing and was replaced. Replacement of a failed component at a new facility presumably would not increase emissions from the facility, and probably would be viewed as routine if the alternative was to forego operation of that new facility. Under such circumstances, it is unlikely that the replacement would trigger the Act's requirements.

million is designated as capital costs.[3] The WEPCO reports that, in terms of annualized costs, the renovation project will cost $7.8 million, as compared to $51.6 million for a new 400 megawatt plant. Thus, renovation costs represent approximately 15 percent of replacements costs.

2. Change in the Method of Operation

The renovation work at Port Washington would not constitute a "change in the method of operation" within the meaning of the PSD regulations. However, it is clear that the "physical change" and "operational change" components of the "major modification" definition are discrete and independent. Thus, as explained below, PSD still applies if there is a physical change that will significantly increase net emissions.

In addition, the regulations exclude from the definition of physical or operational change "an increase in the hours of operation or in the production rate" [see 40 CFR 52.21(b)(2)(iii)(f)]. The preamble to the rule [45 FR 52676,

[3] The WEPCO's July 8, 1987 application to the PSC included a project cost estimate of $83.9 million, of which $45.6 million was designated as capital costs. A more recent cost estimate provided to EPA by WEPCO indicates that several work items are now deemed unnecessary, such that the cost of the original project is now estimated at $70.5 million. However, all but $89,000 of these reductions are designated as "maintenance" items. The recent submission also relates that the scope of the original project has now been expanded to include flue gas conditioning equipment and associated air heater work costing approximately $17 million. Although WEPCO has not broken down these additional costs into capital and maintenance (or "expense") expenditures, it would appear that most, if not all, of this additional work would be classified as capital costs. Thus, it is highly likely that actual capital costs would be significantly higher than $45.6 million.

52704 (August 7, 1980)], makes it clear that this exclusion is intended to allow a company to lawfully increase emissions through a simple change in hours or rate of operation up to its potential to emit (unless already subject to any federally enforceable limit) without having to obtain a PSD permit. Thus, emissions increases at Port Washington associated with increased operations would not, standing alone, subject WEPCO to PSD requirements. However, as discussed in greater detail below, the exclusion for increases in hours of operation or production rate does not take the project beyond the reach of PSD coverage if those increases do not stand alone but rather are associated with non-excluded physical or operational changes.

In its March 17, 1988 letter to Region V and its July 29, 1988 letter to EPA Headquarters, WEPCO asserted that the exclusion for increases in operational hours or production rate also would serve to render PSD review not applicable to the renovation work proposed at Port Washington because the project's purpose was to restore the original design capacity of 80 megawatts per unit, but not to exceed that level. However, a plant's original design capacity is irrelevant to a determination of PSD applicability.

B. Significant Net Emissions Increase

Under the PSD regulations, whether the life extension project at Port Washington would result in a "significant net emissions increase" depends on a comparison between the "actual emissions" before and after the physical changes resulting from the renovation work. Where, as here, the source has not yet begun operations following the renovation, "actual emissions" following the renovation are

deemed to be the source's "potential to emit" [see 40 CFR 52.21(b)(21)(iv)]. Apparently, there would be a "significant net emissions increase" within the meaning of the PSD regulations as a result of the proposed renovations as currently planned, because potential emissions after the project – reflecting the restoration of 80 megawatt capacity at each unit – would greatly exceed representative actual emissions prior to the physical changes. (The fact that the project is intended to restore the plant's original design capacity is irrelevant to that calculation.)[4] If this is so, the project would be a "major modification" subject to PSD review. However, PSD applies on a pollutant-specific basis, and EPA has not been furnished with adequate data regarding the impact of the proposed renovations on the various pollutants to determine whether a significant net emissions increase would indeed occur for any pollutant. Such data must be provided before EPA can make a final determination of PSD applicability.

It is important to note in this regard that WEPCO, at its option, could "net out" of PSD review by accepting federally enforceable restrictions on its potential to emit after the renovation. This could occur through enhancement of existing pollution control equipment, addition of

[4] The WEPCO also contends (July 29, 1988 letter, page 35) that EPA should instead compare representative actual emissions prior to the change with "projected" actual emissions after the renovations. The PSD regulations provide no support for this view. Where, as here, a source is not currently subject to a PSD permit containing operational limitations, EPA must presume, that the source will operate at its maximum capacity and, hence, its maximum potential to emit. However, as discussed below, a source is entitled to reduce its potential to emit by embodying its "projections" of future emissions in federally enforceable restrictions on its operations that may serve to lawfully avoid PSD review.

new equipment, acceptance of federally enforceable operational restrictions, or some combination of these measures, limiting potential emissions to a level not significantly greater than representative actual emissions prior to the renovations. Theoretically, WEPCO could minimize the needed restrictions on its potential to emit following the renovations if it could show that some period other than the most recent two years is "more representative of normal source operation" [see 52.21(b)(21)(ii)]. (Obviously, such a showing would be most important with respect to unit 5, because it has been shut down and has had zero emissions since 1985.) Since these matters are within WEPCO's control, you should advise the company to enter discussions with Region V and Wisconsin, as appropriate, if WEPCO desires to "net out" of PSD review.

The WEPCO also argued in its July 29, 1988 letter, at pages 33-41, that even if EPA is correct that the Port Washington life extension project would involve physical changes within the meaning of the PSD regulations, any emissions increases would be due to increased production rates or hours of operation rather than higher emissions per unit of production. Therefore, WEPCO contends that these increases should be excluded from consideration in determining whether a net significant emissions increase and, hence, a major modification, would occur. The WEPCO is incorrect in this regard.

As noted above, the exclusions cited by WEPCO are intended to apply where a source increases emissions by simply combusting a larger amount of fuel, or processing a larger amount of raw materials during a given time period, or by expanding its hours of operation "to take advantage of favorable market conditions" (see 45 FR 52704). In this instance, however, it is obvious that

WEPCO's plans to increase production rate or hours of operation are inextricably intertwined with the physical changes planned under the life extension project. Absent the extensive renovations proposed at Port Washington, WEPCO would have little market incentive to, and in part would be physically unable to, increase operations at these aged and deteriorated facilities which, absent the renovations, would likely be retired from service in the near future. Thus, WEPCO's plans call for precisely the type of "change in hours or rate or operation that would disturb a prior assessment of a source's environmental impact [and] should have to undergo [PSD review] scrutiny" (see 45 FR 52704). Conversely, accepting WEPCO's interpretation of the major modification regulations would serve to exclude from consideration all physical or operational changes except those which cause increased emissions per unit of production. Clearly, EPA never intended this result. It would allow, through substantial capital investment, significant expansion of the pollution-emitting capacity and longevity of major industrial facilities without PSD review of the impacts on air quality and opportunities for future economic growth.

C. Baseline Date

The November 9, 1987 letter from the Wisconsin Department of Natural Resources to Region V asked whether a complete March 28, 1986 PSD permit application for certain work at Port Washington triggered the PSD baseline date, despite the fact that the permit was never issued. The answer to this question is *yes*. Baseline dates are triggered by the first complete application and remain in effect regardless of whether the application is

revised or withdrawn, or whether the permit is finally issued and the source constructed or modified.

III. NSPS Applicability

The Port Washington renovations are subject to the Act's NSPS if they constitute "modifications" within the meaning of section 111 and 40 CFR Part 60. Under 60.1, the NSPS applies to modifications at an "affected facility." Each unit at Port Washington is properly characterized as an "affected facility" subject to the NSPS at 40 CFR Part 60, Subpart Da, which applies to electric utility steam generating units [see 60.40(a)]. Pursuant to 60.14(a), a modification for NSPS purposes is defined as "any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies." Increase in emission rate is in turn defined as an increase in kilograms per hour (kg/hr) [see 60.14(b)].

Pursuant to longstanding EPA interpretations, the emission rate before and after a physical or operational change is evaluated at each unit by comparing the hourly potential emissions under current maximum capacity to emissions at maximum capacity after the change. In addition, under the Act's NSPS provisions, only physical limitations on maximum capacity are considered in determining potential emissions at power plants. Thus, any prospective changes in fuel or raw materials accompanying the physical or operational change are not considered in determining maximum capacity. Consequently, 60.14(b)(2) requires that, in conducting emissions tests before and after a change to determine whether an increase in emission rate has occurred, "operational parameters" which may

affect emissions must be held constant. Fuel and raw materials are "operational parameters" for this purpose. Similarly, 60.14(e)(4) provides that use of an alternative fuel or raw material which the existing facility was designed to accommodate before the change would not be considered a modification. Thus, for example, a physical change which increases the maximum capacity of the facility would have a corresponding increase in the sulfur dioxide emissions if the facility used fuel with the same sulfur content before and after the change. Such a prospective increase cannot be offset by instead using fuel with a lower sulfur content after the change, because, under the regulations, the facility would always have the option of changing back to the higher sulfur-content fuel at a later date without triggering a modification for NSPS purposes. However, any offsetting reductions in emission rate caused by the concurrent addition of pollution control equipment would be considered in determining whether a physical or operational change results in an increase in emission rate.

The WEPCO contends (July 29, 1988 letter, at pages 20-27) that baseline capacity for the purpose of determining whether an increase in emission rate occurs for purposes of an NSPS modification is the original design capacity of the facility. This is incorrect. The thrust of the NSPS modification provisions is to compare actual maximum capacity before and after the change in question. Thus, original design capacity is irrelevant. The provision in 40 CFR 60.14(b)(2) for manual emission tests to determine whether an increase has occurred clearly contemplates that tests will be done just prior to and after the physical or operational change. The original design capacity of a unit, to the extent it differs from actual maximum

capacity at the time of the test due to physical deterioration – and, hence, derating – of the facility, is immaterial to this calculation.

A. Physical or Operational Change

As with the Act's PSD provisions, a modification occurs for NSPS purposes, if there is either a physical or operational change [see 40 CFR 60.14(a)].

1. Physical Change

As is the case under the PSD provisions, the proposed renovations at Port Washington would constitute a physical change for NSPS purposes, at least at units 2, 3, 4, and 5. The WEPCO would need to supply more information, if EPA is to make a definitive determination as to unit 1.

The rear steam drums are part of the steam generating unit which constitutes the "affected facility" within the meaning of 40 CFR 60.41(a), and the drum replacements at units 2, 3, 4, and 5 are integral to the planned increase in maximum capacity, which is the purpose of the life extension project. With respect to unit 1, other physical changes would increase maximum capacity from 45 to 80 megawatts. However, there is some question whether those changes, in significant part, would occur at the steam generating unit or will be limited to the turbine/generator set, which is not part of the affected facility. We suggest that you pursue this matter with WEPCO to the extent necessary to determine NSPS applicability regarding unit 1.

As with PSD, the NSPS regulations exclude routine maintenance, repair, and replacement [see 60.14(e)(2)].

B. Increase in Emission Rate

It seems clear that, absent some creditable offsetting changes, the increases in maximum generating capacity proposed for each of the Port Washington units would represent an increase in the hourly potential emission rate for each pollutant to which a standard applies over the emission rate prior to the renovation. As noted above, burning cleaner fuels would not be creditable. Similarly, voluntarily restricting the production rate following the renovations also would not be creditable for NSPS purposes, because WEPCO could, at a later date, increase production without triggering NSPS [see 40 CFR 60.14(e)(2)], Accordingly, to avoid triggering NSPS, WEPCO would need to install additional air pollution control equipment, or upgrade existing equipment, to offset the potential emissions increases, such that no increase would occur at maximum capacity. The information submitted indicates that WEPCO may plan some enhancement of the current control equipment, but it is unclear whether this would be adequate to prevent an increase in emission rates. As with PSD applicability, such steps can lawfully avoid NSPS requirements. Accordingly, you should advise the company that it should address these contingencies if it desires EPA to rule on whether WEPCO can avoid NSPS requirements in this fashion.

C. Reconstruction

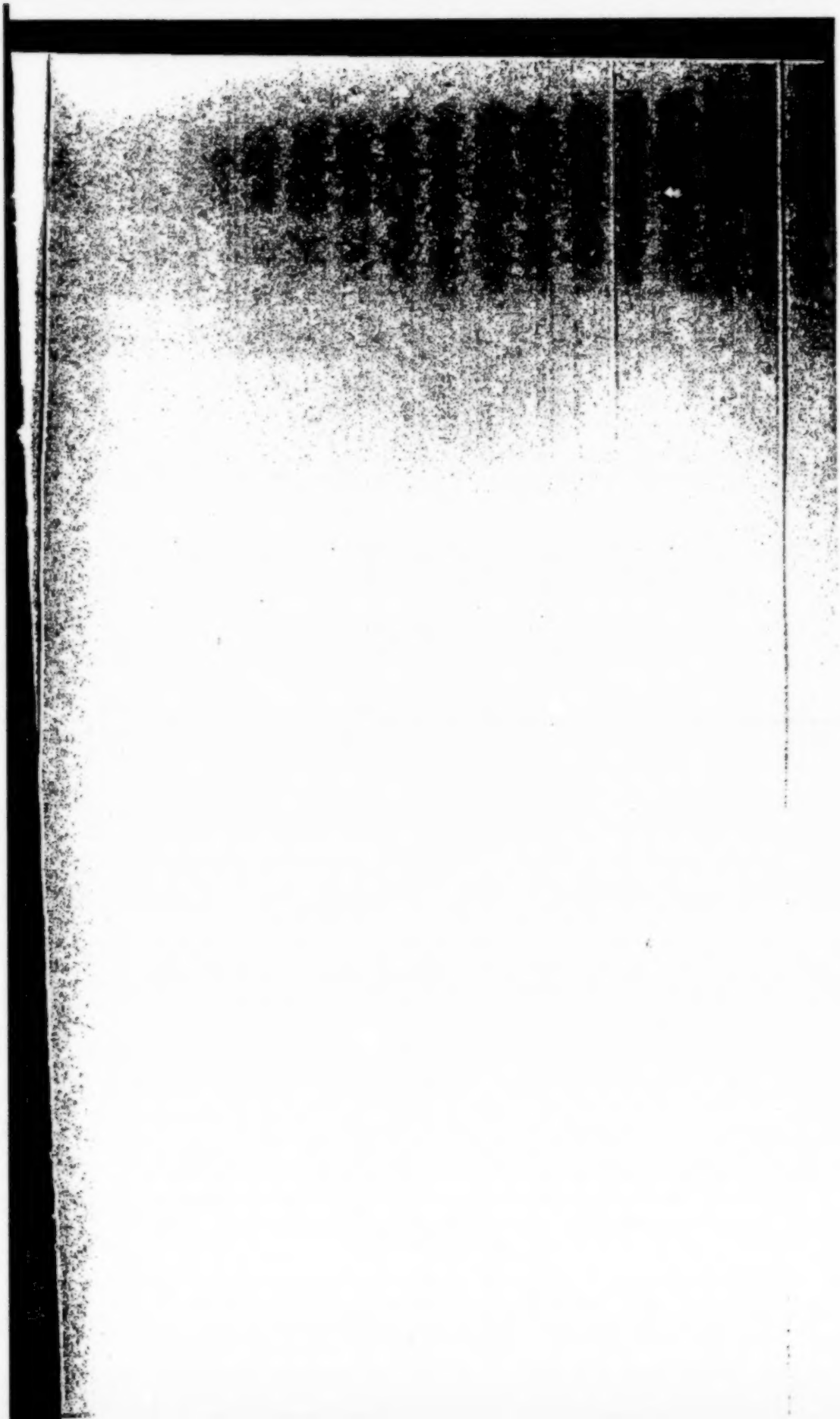
Based upon data provided by WEPCO, it seems that the Port Washington renovations would not qualify as a "reconstruction" for NSPS purposes under 40 CFR 60.15, because the capital cost for the upgrades to each of the five units, while substantial, apparently is less than 50 percent of the fixed capital cost of constructing a comparable,

entirely new steam generating unit [see 60.15(b)(1)]. However, the modification and reconstruction provisions of NSPS are independent. The former provisions are intended to apply in circumstances where physical or operational changes which increase emissions make NSPS coverage appropriate at levels well below 50 percent of the capital cost of a replacement unit. Conversely, the reconstruction provisions are aimed at changes to an existing unit irrespective of associated emissions increases, but trigger NSPS requirements only if the higher 50 percent level is reached. Thus, the suggestion made by WEPCO in its July 29, 1988 letter (at pages 14-15) that EPA must undertake rulemaking to amend the reconstruction regulations before NSPS could be applied to the Port Washington project is not well taken.

IV. Conclusion

In adopting the PSD and NSPS programs, Congress sought to focus air pollution control efforts at an efficient and logical point: the making of long-term decisions regarding the creation or renewal of major stationary sources. The Port Washington life extension project, as it has been presented to EPA, would involve a substantial financial investment at pollution-emitting facilities that may significantly increase potential emissions of air pollutants over a period well beyond the current life expectancy of those facilities. If the additional factual information called for in this memorandum shows that emissions increases would indeed result from this project, the project would be subject to PSD and NSPS requirements. Such a result would be in harmony with the broad policy objectives that Congress intended to achieve through these programs.

cc: Gerald Emison, OAQPS
Alan Eckert, OGC



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No. 05-848

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In The
Supreme Court of the United States

ENVIRONMENTAL DEFENSE, *et al.*,

Petitioners,

v.

DUKE ENERGY CORPORATION, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT APPENDIX
VOLUME II, Pages 266 to 509

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EXHIBIT 76

HUNTON & WILLIAMS
2000 PENNSYLVANIA AVENUE, N.W.
P.O. BOX 19230
WASHINGTON, D.C. 20036
TELEPHONE 202-955-1500
FAX 202-778-2201

[Addresses Omitted In Printing]

June 5, 1989

Ms. Polly Gault
Chief of Staff to the Secretary
United States Department of Energy
1000 Independence Avenue, S.W.
Room 7A257
Washington, D.C. 20585

Dear Polly:

I appreciated the opportunity to meet with you and discuss the so-called *WEPCo* case and its progeny. Enclosed is a briefing paper which explains the problem and outlines how EPA could easily solve it administratively. As discussed in the enclosure, the consequences of these decisions are far reaching. Among other things,

1. *WEPCo* will wholly undermine any "acid rain" legislation designed to allow reductions in the most cost-effective way;

2. *WEPCo* is presently causing utilities to defer needed major maintenance, repair and replacement projects required for maintaining a reliable electric supply;

3. Utilities and others that want to reduce emissions by converting to natural gas are barred from doing so without a PSD new

source permit unless they were capable of burning gas in 1975; and

4. If the *WEPCo* rationale is not qualified, utilities face substantial risks in undertaking a "clean coal" demonstration project.

As I mentioned at our meeting, we have asked Administrator Reilly to reconsider the *WEPCo* interpretations. We know that the EPA staff will oppose our request. This steadfast refusal to back down is best illustrated by a May 5 letter to Detroit Edison where Acting Assistant Administrator Don Clay stated:

> In your March 13 letter, you provided data that illustrated large decreases in the source's "potential to emit" sulfur dioxide, particulate matter . . . and NOx as a result of the conversion. [Nevertheless,] [o]ur review of the available information suggests that Region V's conclusion that the source appears to be subject to PSD review . . . is correct.

We hope the Department and others in the Administration will urge Administrator Reilly to overrule his staff on this important issue. I am sending Linda Stuntz, under separate cover, more detailed information on the WEPCo case, including an *amici* brief supporting Wisconsin Electric in the Seventh circuit litigation. That brief, joined in by the aluminum, steel, utility, petroleum, and coal industries, underscores the broad and adverse impact *WEPCo* will have on energy policy and on our economy.

If I can provide any additional information, please let me know. We would appreciate the opportunity to meet with you and others in the Department within the next

few weeks to discuss analyses we are preparing on the impact of *WEPCo* on the utility industry.

Sincerely yours,

/s/ Henry
Henry V. Nickel

Enclosure

cc: Linda Stuntz, Esquire (w/enclosure)
Mr. Walker Nolan (w/enclosure)
Ms. Lynn LeMaster (w/enclosure)

June 5, 1989

THE WEPCO, DETROIT EDISON, AND OHIO EDISON DECISIONS

In October 1988, Administrator Thomas affirmed a determination of then Acting Assistant Administrator Don Clay finding that new source performance standards (NSPS) (i.e., SO2 scrubbers) and prevention of significant deterioration (PSD) new source permitting requirements would apply if a maintenance, repair, and replacement project (called a "life extension" project) planned at a five unit coal-fired electric generating plant owned by Wisconsin Electric Power Company (WEPCo) went forward. WEPCo was seeking to replace equipment that posed safety concerns at four of the units and required shutdown of one of those units. In addition, replacement of defective equipment was required at two units to allow those units to operate again at design capacity. The remainder of the repairs and replacements in the project were needed to improve efficiency and reliability without having any impact on emission rates.

On February 15, 1989, Acting Assistant Administrator Clay resolved additional issues posed by WEPCo. Among other things, he determined that WEPCo could not avoid NSPS by switching to as lower sulfur coal, but rather would need to install scrubbers or similar controls. He also found that PSD review would be required even though the units were not increasing their emission rate.

In the *Detroit Edison* case, EPA Region V determined that a project to allow natural gas-firing at an oil-fired plant could not be undertaken without a PSD permit. In a May 5 letter, Don Clay observed that the project would substantially reduce emissions, but he nevertheless tentatively concluded that Region V's PSD determination appears to be "correct.

In the *Ohio Edison* case, EPA determined that removing a clean coal technology demonstration project after the demonstration concluded would trigger PSD and NSPS requirements. Although EPA Acting Assistant Administrator Clay promised "no action" in terms of EPA civil enforcement, "clean coal" participants would still potentially face criminal penalties for "knowing" violations of the Clean Air Act and would be subject to citizen suits under the Act. In other words, EPA has made clear that removing a clean coal demonstration project is unlawful (in EPA's view) and has informed those undertaking these demonstration projects that, at most, EPA will not initiate a civil action. Citizens and a local U.S. Attorney can do what they want.

The Utility Air Regulatory Group[1] has requested that Administrator Reilly reconsider these decisions. Detroit Edison is separately seeking review of the Region V decision concerning its natural gas project.

EPA's New Interpretation of the NSPS and PSD Requirements

New Source Performance Standards (NSPS) require new sources to meet a 70-90% scrubbing requirement and other stringent emission limitations. The Prevention of Significant Deterioration (PSD) permit program imposes numerous monitoring and modeling requirements on new sources, as well as technology-based emission limits that are potentially more stringent than NSPS. Existing sources are subject to NSPS and PSD if they are "modified," that is, if they undergo physical or operational changes that increase emissions.

The *WEPCo, Detroit Edison,* and *Ohio Edison* decisions substantially expand the previous understanding of what is a "modified" source for NSPS purposes. Under these decisions, if emissions immediately before a "non-routine" (as determined by EPA staff) change are greater than emissions after the change, NSPS is triggered. This is the case notwithstanding the fact that the emissions

[1] The Utility Air Regulatory Group (UARG) is a voluntary, nonprofit, unincorporated, ad hoc group of 65 electric utilities, the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association. UARG's purpose is to participate on behalf of its members collectively in federal air pollution control regulatory activities and in related litigation. Since 1977, UARG has been involved in all major Environmental Protection Agency Clean Air Act rulemaking and in numerous judicial proceedings related to these rulemakings.

immediately before the change are not representative of normal source operations.

EPA similarly expanded the "modification" requirements that apply to the PSD program. Under these decisions, if EPA finds a change to be "non-routine," EPA will always conclude that the change causes an emissions increase since EPA compares actual annual emissions before the change with the emissions projected from operating 100 percent of the time, at 100 percent capacity, for 365 days. This approach, which allows projects an emission increase, conflicts with the plain language of EPA's rules.

EPA's decisions acknowledge that "routine" repairs and replacements are not subject to the NSPS and PSD modification rules. However, the Agency has arbitrarily redefined what repair and replacement activities are "routine," such that "routine" activities include only those that (1) are frequently done at that plant, (2) involve no major equipment, (3) are inexpensive, and (4) do not extend the life of a plant. This new interpretation is vastly different from past implementation of the "routine" rule, which included any repair and replacement activity that is normal business practice. It gives EPA staff virtually unlimited discretion to find that any major repair or replacement project is "non-routine."

Direct Impacts of the WEPCo,
Detroit Edison, and Ohio Edison Decisions

Under these decisions:

1. A unit that discovers safety problems due to an unanticipated defect in equipment and shuts down pending repairs cannot resume operations without

meeting stringent new source standards and receiving a new source prevention of significant deterioration ("PSD") permit. This occurs whenever EPA determines the repair or replacement is not "routine." *WEPCo,* Port Washington Unit 5, October 14 letter.

2. A unit, under the *WEPCo* decision, cannot repair or replace deteriorated or defective equipment needed to return to past maximum operating levels, unless the repairs or replacements are "routine." *WEPCo.*

3. A unit cannot avoid an emissions increase that would trigger new source standards by switching to a lower sulfur coal oil, or to natural gas. It must install control technology (e.g., scrubbers). *WEPCo,* February 15 letter.

4. A utility experiencing increased forced outages at its units due to equipment problems cannot undertake repairs needed to avoid serious electric reliability problems without applying for and receiving a PSD permit, even though these repairs will only improve reliability and efficiency and will not increase the emission rate of the units. This occurs whenever EPA determines these "emissions neutral" or even "emissions beneficial" repairs or replacements are not "routine." *WEPCo, Detroit Edison.*

5. A unit that was not able to burn a lower polluting fuel (e.g., natural gas) in the past cannot be converted to burn that fuel without first applying for and receiving a PSD permit. *Detroit Edison.*

6. A unit that has undertaken a "clean coal" demonstration project must meet new source standards and obtain a PSD permit if it wishes to remove the experimental technology at the end of the demonstration period. EPA may issue a "no action" assurance to such a project. *Ohio Edison.* A "no action" assurance is a promise by the EPA signatory – (in the case of *Ohio*

Edison, an Acting Assistant Administrator) that EPA will not bring a civil enforcement action. This does not insulate the company from a "citizen suit" under the Clean Air Act. Also, as the attachment to the EPA *Ohio Edison* letter makes clear, a U.S. Attorney can still bring-a criminal prosecution.

Broader Consequences of the WEPCo, Detroit Edison, and Ohio Edison Decisions

1. *WEPCo* will wholly undermine any "acid rain" legislation designed to allow reductions in the most cost-effective way. For example, it subjects many older, smaller units to scrubbers when these units are the logical candidates for fuel switching.

2. *WEPCo* is presently causing utilities to defer needed major maintenance, repair and replacement projects required for electric system reliability. The consequence of such deferrals is that utilities must risk interruption of service in the very near future or costly expenditures on short-term solutions (e.g., unplanned installation of combustion turbines). Given the time required to obtain a PSD permit to undertake a repair program at an existing unit or to install a new combustion turbine, a substantial deterioration in electric reliability in the near future – with serious health and environmental consquences – is likely unless *WEPCo* is revisited.

3. For other industries, *WEPCo* says: you may not undertake major repairs or replacements that restore a plant to its past levels of production unless someone in an EPA region or EPA headquarters finds that the project is "routine." Given EPA's restrictive interpretation of "routine," the *WEPCo* decision means that such projects cannot be undertaken without assuming

substantial risks or seeking a determination from EPA that could take 6 to 12 months.

4. Even more troublesome is the WEPCo determination that major repairs and replacements that improve "reliability" and "efficiency" but do not increase (and may even *reduce*) emission rates can require a PSD permit unless EPA determines that the project is "routine. This aspect of the WEPCo decision is hostile to improving the productivity of our basic industries.

5 Utilities and others that want to reduce emissions by converting to natural gas are barred from doing so without a PSD permit unless they were capable of burning gas in 1975. This will cause companies to abandon such conversions in many cases and delay them (due to PSU permitting requirements) whenever a company decides to proceed.

6. If the WEPCo rationale is not qualified, utilities face substantial risks undertaking a "clean coal" demonstration project. If new source requirements apply upon removal of the experimental controls, a unit will have to be shut down or, face very costly retrofit controls. The price may be too great for many companies, thereby discouraging participation in the program.

Adminsitrative Solution to the WEPCo, Detroit Edison, and Ohio Edison Cases

In the *WEPCo, Detroit Edison,* and *Ohio Edison* decisions, EPA interpreted its new source performance standards (NSPS) and prevention of significant deterioration (PSD) requirements in an unprecedented manner. While the rules governing these EPA programs are complex, the EPA determinations in these cases could be easily overcome with the following interpretations:

1. For NSPS purposes; EPA can, and should, recognize that, in determining an emissions increase, representative operations of the unit should be used in comparing past emissions to future emissions after a change. Nothing on the face of EPA's regulations or their regulatory history precludes such a declaration by the new EPA Administrator. Such a "clarification" would mean that "clean coal" technologies could be removed at the end of the demonstration period, without triggering NSPS. It would also allow utilities and other industries to make necessary repairs to return plants to past maximum production levels.

2. For PSD purposes, EPA can, and should, recognize that any emission increase predicted to occur as a result of an increase in hours of operation or production rate up to original design capacity (unless limited by a federally enforceable restriction on production or hours) is an exempt emission increase, as § 52.21(b)(2)(iii)(f) of EPA's rules explicitly and unambigiously provides. This reconsideration of the *WEPCo, Detroit Edison,* and *Ohio Edison* decisions would allow "clean coal" projects to proceed without having to receive a PSD permit. It would also allow industry to convert to lower-emitting natural gas without a PSD permit.

EXHIBIT 82

February 9, 1989

W. O. Parker, Jr.

Subject: EEI Prime Movers – WEPCO

The following is a summation of the discussion with WEPCO and other utilities about the WEPCO case.

I have shared this information with the review committee and FPD GO managers. We may want to add this to the managers' meeting agenda as a 30 minute update item.

Feel free to use this report as you see fit in updating others in management about what we learned.

Major points from the *WEPCO* discussion:

- WEPCO must send a letter notifying thier commission of plans to do work costing more than $1,000,000.
- WEPCO must get a certificate from the commission for any work over $2,000,000.
- WEPCO filed for certificate with the Commission to do $71,000,000 of repair and upgrade work.
- Commission ask State environmental group to review work in relationship to PSD and NSPS standards.
- Wisconsin like NC has a state operated program approved by EPA.
- W.E.C. requested EPA Region 5 to review.
- Region 5 responded that PSD was triggered and NSPS applied because modification work:
    - Increased efficiency (rebuilt preheater).
    - Increased capacity (corrected drum).

- Increased emission above the level emitted for the prior two years.
- Resulted in significant spending, $71 M or 20% of replacement generation cost.

- *WEPCO* requested review by Washington.
- Washington supported Region 5 decision.
- *WEPCO* has filed suit against EPA.
- Lawyers estimate 11 to 23 months.
- Florida Power Corporation – Port Everglades plant is under going similiar work.
- AEP – Has taken no units out but is doing the same type of work that we are doing.
- Court case should clear interpretation of cost (50% vs. less) and increased emissions time frame (prior 2 years) standard.
- NC Environmental Air is acting like they are not aware of WEPCO.

WEPCO Recommended that others SHOULD NOT:

- ★ Derateunits.
- ★ Remove from servicefor extended periods.
- ★ Do large major repairs as one project (WEPCO less the $1 M increments)
- ★ Project retirement datesfor units as this establishes the useful end point or life of a particular unit.

J. O. Fayssoux
Fossil Production Department

JOF:mmp

EXHIBIT 93A

NSPS/PSD Implications of Plant Modifications

New Source Performance Standards: [For Boiler Only]

Apply to new facilities or modifications to existing facilities.

For NSPS, modification is defined as:

- **any physical or operational change which:**
- **results in an increase in maximum hourly emissions.**

Maximum hourly emissions are determined by the maximum which can be demonstrated over the past five years. This should be compared to what the maiximum emissions will be after the change.

NSPS does not apply to any action which can be classified as routine maintenance, repair, or replacement, or to work which can be accomplished without a capital investment. The federal court ruled in WEPCO that EPA was correct in saying that WEPCO's decision to forego repairs and allow the unit to deteriorate over a long period of time was evidence that the planned work was not routine. Based on that ruling, the five year test was put into the regulation.

Prevention of Significant Deterioration: [Total emissions over a year]

Similar criteria to NSPS, but considers emissions over an annual period and applies whether or not the project is a capital expense. Increased production which could not otherwise be achieved without the modification will trigger PSD requirements.

[Last (five) 5 years maximum hourly emission routine maint. (capacity) replacement

Gross MW

1. .5%

AP42 calculated emissions based on fuel input allow 3 ID. Fan – max capacity test]

EXHIBIT 98

[SEAL]

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D C 20460

Mr. John W. Boston
Vice President
Wisconsin Electric Power Company
Post Office Box 2046
Milwaukee, Wisconsin 52301

Dear Mr. Boston:

This is a revised final determination, on reconsideration, regarding the applicability of the Clean Air Act's New Source Performance Standards (NSPS) and Prevention of Significant Deterioration (PSD) provisions to the proposed life extension project at the Port Washington steam electric generating station, which is owned and operated by Wisconsin Electric Power Company (WEPCO). This determination supplements the determination set forth in an October 14, 1988 letter to you from Lee M. Thomas, which in turn incorporated my September 9, 1988 memorandum. I find it necessary to reconsider EPA's original determination and issue this revised determination in part to address matters raised by, and new information submitted by, WEPCO representatives since, the October 14 letter. WEPCO believes that these new aspects call into question the accuracy of EPA's prior determination.

For the following reasons, EPA today reaffirms, with limited exceptions detailed below, its earlier findings regarding the Port Washington life extension project. I hereby incorporate by reference the October 14 letter and

the September 9 memorandum. and reaffirm the findings and conclusions in those two documents except where they are specifically superseded below.

This action constitutes final agency action for purposes of judicial review under section 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b).

I. CAPITAL EXPENDITURE

EPA explained in its earlier determination that under the General Provisions of the NSPS regulations, a physical or operational change which increases emissions at an affected facility is a modification subject to NSPS. See 40 CFR 60.14(a). However, 40 CFR 60.14(e) provides certain exceptions to that general rule. In particular, section 60.14(e)(2) provides that an increase in production rate, at an affected facility would not, by itself, be considered a modification if that increase is accomplished without a capital expenditure.

As has been discussed in recent meetings between WEPCO and EPA, the October 14, 1988 letter from Lee M. Thomas was based in part on information supplied by WEPCO in a letter dated October 11, 1988 which indicated that the increase in production rate at each of the five units would be accomplished with a capital expenditure. On October 13, 1988, and November 22, 1988 WEPCO submitted revised capital expenditure calculations. EPA has carefully reconsidered its earlier determination based on those two additional submissions.[1] However, as explained

[1] The October 13, 1988 submission was not received in time to be considered in issuing EPA's letter of October 14, 1988.

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below, they provide no grounds on which to alter EPA's earlier finding on capital expenditure.

The modification provisions are designed in part to subject to NSPS these emissions increases caused by an increase in production rate that is in turn attributable to a significant investment in improvements to the capital stock. Consistent with this intent capital expenditure calculations employ the total, as opposed to annual, cost of a given project at each affected facility.

Thus, the December 16, 1975 preamble to the promulgated definition of capital expenditure states that " . . . the *total* cost of increasing the production or operating rate must be determined. *All* expenditures necessary to increasing the facility's operating rate must be included in this total" (40 FR 58416) (emphasis added). The total cost of the planned work at each facility is then compared to the product of the existing facility's basis and the annual asset guideline repair allowance percentage used by the Internal Revenue Service for taxation purposes. If the total project cost for each facility exceeds the product of the basis and repair percentage for each facility, there is a capital expenditure at that facility. See 40 CFR 60.2.

It is appropriate to accumulate, for capital expenditure purposes, the cost of the renovations necessary to increase the facility's production rate, because the overall work necessary to increase a facility's production rate pursuant to a particular renovation project is the same whether the work is performed in one calendar year or during two (or more) years. The use of annual costs could encourage sources to distort normal business planning by artificially stretching out costs over time as a means of

evading a finding of capital expenditure and consequent NSPS coverage.[2]

Rather, the purpose of the exemption in 40 CFR 60.14(e)(2) is to exclude from NSPS coverage increases in production rate that are accomplished without "an expenditure for long-term additions or improvement." See 39 FR 36948 (preamble to proposed NSPS regulations). Where the economic realities of the case are that increased production and, hence, emissions, are due to normal fluctuations in the business cycle rather than a considered decision to invest in substantial capital improvements, the NSPS do not apply.

The letter submitted on October 13 from Neil Childress of your staff to Gary McCutchen of EPA presented *updated* basis figures (determined by multiplying the original capital investment in the facility by a coefficient representing the inflation in construction costs between the year of the investment and the year in which the capital expenditure calculation is made) for each of the emissions units at Port Washington. These figures included costs of repair or replacement of equipment, such as steam turbines, that is not part of the existing affected

[2] Indeed, it appears that WEPCO may have extended the planned length of the Port Washington life extension project for precisely this purpose after being informed by EPA in the October 14, 1988 letter that there would be a capital expenditure using the original schedule. The unit 1 renovations have been extended from four years to five; unit 2 has been extended from four years to six; unit 3 has been extended from three years to six; unit 4 has been extended from two years to four. (Compare Telecopier Transmission, Neil Childress, WEPCO, to Gary McCutchen, EPA, October 11, 1988 (table attached to Response to Question No. 4) with Letter, Neil Childress, WEPCO, to Walt Stevenson, EPA, November 22, 1988, at page 2.)

facility for NSPS purposes. Since applicability determinations under the NSPS modification provisions are based on the existing affecting facility, capital expenditure determinations likewise are limited to costs associated with the affected facility. For NSPS Subpart Da, the affected facility is the steam generating unit as defined at 40 CFR 60.40a. Therefore, EPA staff requested WEPCO to limit the basis figures to the steam generating unit.

The November 22, 1988 letter from Neil Childress to Walt Stevenson of EPA presented revised cost figures on the renovation work on steam generating units 1 – 4 related to the capital expenditure calculations. These November 22 basis figures are understood to be limited to costs associated with the affected facility. The November 22 letter also presented a revised and extended schedule for the renovation work, under which the costs of repairs in any one year would not exceed the product of the annual asset guideline repair allowance percentage, which is 5% for electric utility steam generating units, and the basis of each unit. Mr. Childress' letter concluded that since 5% of each unit's updated basis is not exceeded by the cost of renovation work in any one year, there would not be a capital expenditure at any of the units. The revised figures also show that the total costs for each unit over the entire renovation period would exceed the 5% basis figure by 50% to 325%.

As explained above, it is the total cost, not the annual cost of a renovation project that determines whether a capital expenditure has occurred. Accordingly, based on the calculations and total project costs in WEPCO's November 22, 1988 letter, the proposed project would result in a capital expenditure at each of the five Port Washington units, and those units would not qualify for the exemption in

the NSPS modification provisions at 40 CFR 60.14(e)(2).[3] As to unit 5, WEPCO did not submit cost data limited to the affected facility. Thus, I have no reason to alter EPA's original determination that WEPCO has not demonstrated that the increase in production rate at unit 5 can be accomplished without a capital expenditure.

In addition, I have determined that it is more appropriate to utilize the *original* basis of each affected facility (as adjusted to reflect past capital improvements), expressed in nominal dollars, rather that the *updated* basis, expressed in current dollars, in determining NSPS applicability. Thus, even if WEPCO were correct that annual renovation costs, rather than total costs, should be used in capital expenditure calculations, in this case a comparison of annual renovation costs and the (adjusted) original basis of each affected facility shows that a capital expenditure would still occur.[4]

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[3] WEPCO has argued that since the definition of capital expenditure at 40 CFR 60.2 refers to the IRS "*annual* asset guideline repair allowance percentage" (emphasis added), EPA is bound by the literal language of its own regulations to use annual rather than total project costs in making capital expenditure calculations. However, the regulations do not dictate such a result. Instead, on their face they call for a comparison between *total* renovation costs and the annual asset guideline. Had EPA intended the result suggested by WEPCO, it would have explicitly called for comparison of annual costs of the change for projects exceeding one year with the annual asset guideline. This it did not do. In addition, as indicated above, the purpose of the capital expenditure provision would not be served by annualizing project costs for capital expenditure purposes.

[4] It is worth noting in this regard that if EPA were to adhere to a literal reading of IRS guidelines as urged by WEPCO, it would have no choice but to use *original* basis as well as annualized costs in making capital expenditure calculations for Port Washington. Using this

(Continued on following page)

In making a more detailed inquiry into the capital expenditure matter in response to WEPCO's request, I have found that neither the NSPS General Provisions nor the preamble thereto contain any discussion of the matter of original versus updated basis, and that EPA has rarely been called upon to address this issue. However, upon review of EPA's past practice in this area. I have found that in developing performance standards for particular industries, EPA has provided the regulated community a mechanism to calculate the original basis in making capital expenditure calculations. See, e.g., "Equipment Leaks of VOC in Petroleum Refining Industry – Background Information for Promulgated Standards," EPA-450/3-81-015b, December 7, 1983.[5] This suggests that EPA intended the original basis to be utilized to determine whether a capital expenditure is going to be made.

Moreover, I believe that the use of original basis is consistent with the overall purpose of the NSPS modification regulations in general, and the capital expenditure provisions in particular. The effect of using original basis is that the greater the age of an affected facility, the more likely it is that a given investment resulting in increased production will be deemed a capital expenditure and trigger NSPS. This is consistent with Congress' intent in adopting new source performance standards. Older facilities are most likely to use outdated equipment which does

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formula, WEPCO would exceed the repair allowance percentage at units 1 – 5 for most years, and NSPS would still apply.

[5] This Background Information Document provides an alternative to the method prescribed in the General Provision when it is difficult to determine original costs. The formula uses replacement costs and an inflation index to "approximate the original cost basis of the affected facility."

not reduce pollution to the extent more current technology does. Congress included modified sources within the new source performance standards of section 111 to ensure the use of new technology on such sources. *See* CAA §§ 111(a)(2), 111(a)(4).

II. AIR HEATER RENOVATIONS AT UNIT 1

In January 1989, WEPCO asked EPA to determine whether replacement of the heat transfer surface elements on the unit 1 air heater would trigger PSD or NSPS applicability. However, in a letter dated February 3, 1989, WEPCO withdrew this request, asserting that it could not receive approval in the time necessary, while reserving the right to renew it at a later time as to unit 1 or any other unit at Port Washington. Because this issue may arise again, and because I believe it bears upon the project as a whole, I find it appropriate to address the matter of air heater element replacement. Based on the information submitted regarding this new plan, as well as the earlier
ıation submitted regarding air heater replacement
I conclude that if WEPCO were to proceed under its
ł and now withdrawn plan, it would not alter EPA's
finding that PSD and NSPS would apply. In order
ain this finding, it is useful to first summarize the
ıt facts.

iginally, WEPCO advised EPA that it planned to
the air heaters at unit 1 – 4 in their entirety. As
) explained:

> Air heaters are subject to the erosive and
> rosive effects of the flue gas passing through
> :m and require regular maintenance of the
> ıt transfer surfaces.

> The plate-type air heaters on Units 1 – 4 do not lend themselves to replacement of the individual elements. Worn sections have been patched and blocked, where accessible, over the years. Now, however overall corrosion and perforation has passed beyond the practical point of repair, and replacement of the air heaters is the economical way to maintain the air preheater system.
>
> The air heaters on Port Washington Unit 5 and the other units on the Wisconsin Electric System [other than Port Washington units 1 – 4] are of the Ljungstrom basket design, which allows the heat transfer surfaces (baskets) to be replaced easily ***

See, e.g., List of Port Washington Projects, p. 6 (Attachment to April 22, 1988) Letter from John W. Boston, WEPCO, to Gary McCutchen , EPA.

On January 11, 1989, WEPCO informed the State of Wisconsin that it was considering replacing all the plate elements at unit 1. In a letter to the State of Wisconsin, WEPCO described this project as routine repair work, "necessary to halt the continuing decrease in the capability of Unit 1," and submitted a list of 40 generating units where significant portions of the air heater have been replaced. See Letter, with attachment, from Mark P. Steinberg, WEPCO, to Dale Ziege, Wisconsin Department of Natural Resources, January 11, 1989.

In a telephone conversation with EPA staff the next day, WEPCO indicated that it desired to perform the unit 1 plate replacement work during a current unit outage; that intended to replace only half, not all, of the elements, at a cost of approximately $500,000; that it intended to

later scrap this work and replace the entire air heater as described in the original scope of work at a cost of $2,600,000; and that it was considering performing the same work at unit 4 also. See Record of Telephone Conversation between David Schulz, EPA, and Mark Steinberg, Neil Childress, and Walter Woelfle, WEPCO, January 12, 1939.

In a meeting on January 17, 1989, WEPCO related that if it replaced half of the plate elements now, it probably would replace the remainder as part of the total renovation project at a later date and *not* replace the air heater in whole. WEPCO also related that complete replacement of the plate elements should increase unit 1's capability to the original design capacity. Finally, WEPCO stated in response to questions from EPA staff. that none of the air heaters or plate elements at units 1-4 had ever been replaced in the past. See Memorandum, Meeting with WEPCO regarding the Port Washington Generating Station, from David Schulz, EPA, to Files, January 27, 1989.

In addition to the above information, I note that WEPCO's list of 40 units at which air heater element replacements have occurred include no units containing plate elements such as those on units 1-4 at Port Washington. Instead, all of the examples submitted are of the Ljungstrom basket type or the tubular type. I conclude that those examples are too dissimilar to the plate-type elements in use at units 1-4 to support WEPCO's contention that the work in question is routine.[4]

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[4] Further, even the list of air heater replacement work submitted by WEPCO did not establish this as routine repair work. Those 40 units

(Continued on following page)

Based on all of the foregoing, I find no reason to depart from EPA's earlier conclusion that PSD and NSPS would apply to the air heater work on unit 1. It appears that despite WEPCO's recent recharacterization of this work as a separate project, it is properly viewed as an integral part of the overall Port Washington life extension project. WEPCO cannot evade PSD and NSPS applicability by carving out, and seeking separate treatment of significant portions of an otherwise integrated renovation Program. Such piecemeal actions, if allowed to go unchallenged, could readily eviscerate the clear intent of the Clean Air Act's new source provisions. Accordingly, if seen as part of WEPCO's previously proposed renovation project, the recent recharacterization of the unit 1 air heater work does nothing to alter the factors determinative of PSD and NSPS coverage.

III. CAPACTY TESTING FOR UNITS 1-4

A. Impact of Test Results on NSPS Applicability.

In Lee Thomas' October 14, 1988 letter, EPA stated that baseline emissions for NSPS purposes are determined by hourly maximum capacity just prior to the renovations. EPA relied on actual operating data to determine that current maximum capacity at units 1-4 has significantly deteriorated, such that the restoration of original design capacity through the lift extension project would result in corresponding emissions increases. As to unit 5, EPA stated that current capacity at unit 5 is zero because it is

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comprise only a small fraction of total operating utility units, and even at the 40 units, air heater repair or replacement appears to have been a one-time occurrence, not routine repair.

physically inoperable. EPA rejected WEPCO's unsupported assertions that all five units could be operated at high capacities, but held open the possibility of further discussions on that point. Subsequently, in November and December of 1988, following discussions with EPA, WEPCO conducted capacity tests to determine current actual capacity.

Based on its review and analysis of the test data, EPA finds that the tests adequately demonstrate that units 2 and 3 can be operated at their original design capacity on a sustained basis. Accordingly, I hereby supersede EPA's earlier determination and find that NSPS would not apply to units 2 and 3 by virtue of the proposed renovations so long as the capacity of these units after completion of the work is no higher than demonstrated in the recent tests (694,000 and 690,000 pounds of steam per hour, respectively). As discussed in more detail below, this revised NSPS determination does not affect our determination that the PSD provisions would be applicable to the proposed work on these two units.

During the tests on units 1 and 4, WEPCO was able to operate these units at 497,000 and 586,000 pounds of steam per hour, respectively, representing 72% and 89% of these units' respective original design capacities. These tests are adequate to confirm EPA's original determination that units 1 and 4 are not capable of operating at their original design capacities, and that restoration of the lost capacity through the life extension will trigger NSPS coverage. EPA today also determines that these tests are not adequate to show that current actual capacity for purposes of establishing the NSPS baseline is as high as the levels achieved during the recent tests. Rather, I reaffirm that baseline for those units is determined by the

lower capacities reflected in recent actual operating data as set forth in Lee Thomas' October 14 letter. EPA must reject the tests for purposes of establishing actual NSPS baselines because during the testing discussed above, there were significant measured exceedances of the applicable particulate mass emission limit and several measured exceedances of the applicable opacity limit contained in the Wisconsin State Implementation Plan. One of the purposes of these tests was to determine the maximum actual capacity of the Port Washington units that can be achieved in a lawful manner. As a consequence of the measured exceedances, WEPCO's tests cannot be relied on to demonstrate that the company could lawfully sustain the levels achieved during the testing.

Regarding unit 5, I find that by declining to conduct or schedule capacity tests, WEPCO has effectively conceded that unit 5 is at present inoperable. Therefore, I reaffirm that its baseline for NSPS purposes is zero.

B. Impact of Test Results on PSD Applicability.

In its February 3, 1989 letter, WEPCO asserted that EPA's October 14, 1988 determination assumed that the emission rate of each unit would increase following the renovations. Thus, WEPCO claims, EPA did not address the question whether units that are not increasing their emission rates following renovation can be deemed to trigger PSD. WEPCO is incorrect on both counts.

EPA's prior determination explained that under the PSD program, unlike NSPS, baseline emissions are determined by representative actual emissions prior to the physical or operational change. Accordingly, the results of testing conducted by WEPCO, intended to determine

current maximum hourly capacity, have no impact on the existence of a significant net emissions increase for PSD purposes. Hence, those test results provide no reason to alter EPA's prior determination regarding PSD applicability.

Actual emissions are the product of the emission rate (amount of pollution per unit of production or throughout, e.g., pounds of sulfur dioxide per ton of coal combusted), the production rate or capacity utilization (amount of production or throughout per hour, e.g., tons of coal combusted per hour), and the hours of operation (e.g., hours per year). In its prior determination, EPA explained that an increase in any one of these three factors, if attributable to a physical or operational change, can trigger an emissions increase for PSD purposes, and rejected WEPCO's contention that only increases in the emission rate were determinative. In so doing, EPA explicitly assumed that emissions increases at Port Washington would come not from an increase in emission rate, but rather from increases in production rate or hours of operation. See Memorandum from Don R. Clay, September 9, 1988 at 8.

WEPCO further implies in its February 3, 1989 letter that the demonstration that units 2 and 3 can operate now at maximum design capacity means that there will be no increase in production rate for PSD purposes following the renovations. This is not the case because PSD baseline emissions are determined by *representative actual* emission rate, production rate, and hours of operation prior to the physical change. Representative actual emissions are determined by examining "the actual emissions during a representative two year period, (See 40 CFR 52.21(b)(21)(ii)) which in this case the Administrator determined to be

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1983 and 1984 (See Lee Thomas' Oct. 14 letter, at 5). The hourly capacity demonstration for NSPS purposes is not relevant to the PSD analysis.

IV. NSPS OPERATIONAL LIMITATIONS

In my September 9, 1988 memorandum, I pointed out that an affected facility cannot avoid NSPS applicability by offsetting, through the use of fuel with a lower sulfur content, an increase in the emission rate that would otherwise occur due to a physical or operational change. As I explained at that time, 40 CFR 60.14(e) provides that use of an alternative fuel or raw material – such as higher-sulfur coal – which an existing facility was designed to accommodate before a physical or operational change does not constitute a modification for NSPS purposes. It follows that the facility cannot avoid NSPS by switching to lower-sulfur fuel to counteract a prospective increase in emission rate because, under the regulations, the facility would always have to option to switch back to a higher-sulfur fuel at a later date without triggering NSPS.

Subsequent to the issuance of EPA's October 14, 1988 letter, WEPCO inquired whether it might be able to utilize lower-sulfur coal to avoid NSPS at Port Washington, notwithstanding the regulatory provision explained above, by agreeing to federally enforceable permit conditions that would bar the company from switching back to higher sulfur coal in the future. Restrictions of this nature are acceptable for netting transactions under the Act's PSD provisions. However, the statute reflects a basic political decision that fossil fuel-fired sources not rely only on natural occurring less-polluting fuels to comply with the NSPS. Instead, Congress declared that compliance must

depend in part upon the application of flue gas treatment or other pollution control technologies. Thus, section 111(a)(1)(A)(ii) defines "standard of performance" for fossil fuel-fired sources as

> requiring the achievement of a percentage reduction in the emissions from such category of sources from the emissions which would have resulted from the use of fuels which are not subject to treatment prior to combustion. . . .

Congress further clarified this point in a later paragraph of section 111(a) by adding:

> For the purpose of subparagraph (1)(A)(ii), any cleaning of the fuel or reduction in the pollution characteristics of the fuel after extraction and prior to combustion may be credited . . . to a source which burns such fuel.

This core policy judgment is reflected as well in the legislative history of the 1977 Clean Air Act amendments. For example, the Conference Report states:

> The Senate concurs in the House provision with minor amendments. The agreement requires (1) that the standards of performance for fossil fuel-fired boilers be substantially upgraded to require the use of the best technological system of continuous emission reduction and to preclude use of untreated low sulfur coal alone as a means of compliance; . . . (3) that for fossil fuel-fired sources, the new source performance standards must be comprised of both a standard of performance for emissions and an enforceable requirement for a percentage reduction in pollution from untreated fuel.

H.R. Rep. No. 95-564, 95th Cong., 1st Sess. 130.

Because the will of Congress is so clear that lower-sulfur fuels alone will not suffice to *comply* with NSPS, it would be inconsistent with the legislative intent for EPA to allow sources to use lower-sulfur fuel to *avoid coverage* of NSPS in the first instance in the manner suggested by WEPCO. If EPA were to follow such a course, numerous modifications to existing facilities could escape coverage in a manner contrary to the statutory purpose.

V. THE TIMING OF THE LIFE EXTENSION PROJECT

In discussions with EPA, WEPCO has challenged, on grounds of timing, EPA's position on baseline emissions for NSPS purposes. In its prior determination, EPA explained that under the NSPS regulations, baseline emissions are determined by hourly maximum capacity just prior to the renovations. Thus, the baseline for unit 5 at Port Washington is zero because the unit has been shut down for several years due to safety concerns. In response, WEPCO has presented the hypothetical question whether EPA would still have found a zero baseline if unit 5 had been shut down on a Friday due to some unexpected or catastrophic failure of a major component previously in good working order, and WEPCO had sougt to replace that component on the following Monday. WEPCO asserts that in such circumstances, EPA should have established baseline emissions using the emissions rate just prior to the breakdown.

I. find it unnecessary to engage in speculation by addressing the hypothetical situation presented by WEPCO, because it is far removed from the true circumstances surrounding the proposed Port Washington life extension project. In fact, unit 5 has been shut down for

over four years, not a weekend, and that is the foundation of EPA's analysis and determination.

In conclusion, with limited exceptions, EPA today reaffirms the decisions reached in the October 14 determination. In addition, EPA has concluded that the work on each unit constitutes a capital expenditure and that the proposed air heater plate replacement work on unit 1. would trigger PSD and NSPS. As a result of the capacity test demonstration, however, I find that units 2 and 3 at Port Washington can be operated at their design capacity on a sustained basis. Therefore EPA's earlier determination with respect to NSPS applicability is superseded and NSPS would not apply to units 2 and 3 by virtue of the proposed renovations so long as the capacity of these units after the completion of this work is no higher than demonstrated in the recent tests. This determination does not affect PSD applicability for these two units. If you should have any questions about the foregoing, please feel free to contact me. Thank you for your cooperation in this matter.

Sincerely,

/s/ _____

Don R. Clay
Acting Assistant Administrator
for Air & Radiation

EXHIBIT 101

[LOGO] **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

MAY 23 2000

REPLY TO THE ATTENTION OF
R-19J

Henry Nickel
Counsel for the Detroit Edison Company
Hunton & Williams
1900 K Street, N.W.
Washington D.C. 20006-1109

Dear Mr. Nickel:

I am responding to your request on behalf of the Detroit Edison Company for an applicability determination regarding the proposed replacement and reconfiguration of the high pressure section of two steam turbines at the company's Monroe Power Plant, referred to as the Dense Pack project. Specifically, you requested that the United States Environmental Protection Agency (EPA) determine whether the Dense Pack project at the Monroe Power Plant would be considered a major modification that would subject the project to pollution control requirements under the Prevention of Significant Deterioration (PSD) program.

We have reviewed your original request, dated June 8, 1999, and the supplemental information you submitted on December 10, 1999, and March 16, 2000. We provisionally conclude that the Dense Pack project would not be a major modification. Thus, Detroit Edison may proceed with the

project without first obtaining a PSD permit. Although the Dense Pack project would constitute a nonroutine physical change to the facility that might well result in a significant increase in air pollution, Detroit Edison asserts that emissions will not in fact increase due to the construction activity, and EPA has no information to dispute that assertion.

As you know, nonroutine changes of any type, purpose, or magnitude at an electric utility steam generating unit – ranging from projects to increase productions efficiency to even the complete replacement of entire major components – are excluded from PSD coverage as long as they do not significantly increase emissions from the source. Thus, Detroit Edison has been free to proceed at any time with the Dense Pack project without first obtaining a PSD permit as long as it adheres to its stated intention to not increase emissions as a result of the project. Indeed, EPA encourages the company to proceed with the project on this basis, since it appears to both reduce emissions per unit of output and not increase actual air pollution.

As you are also aware, under the applicable new source review regulations, in determining if a physical change will result in a significant emissions increase at an electric utility plant, companies may use an "actual" to "representative actual annual emissions" test for emissions from the electric utility steam generating unit, under which a calculation of baseline emissions and a projection of future emissions after the change is needed. Our determination of nonapplicability is provisional because Detroit Edison has not, to our knowledge, provided a calculation of baseline emissions or projected future emissions to the permitting agency, and this should be done prior to the start of construction. The basis for this determination is

summarized below and is set forth in full in the enclosed detailed analysis.

In determining whether an activity triggers PSD, the Clean Air Act and EPA's regulations specify a two-step test. The first step is to determine if such activity is a physical or operational change, and if it is, the second step is to determine whether emissions will increase because of the change. The statute admits of no exception from its sweeping scope, but EPA's regulations contain some narrow exceptions to the definition of physical or operational change. In particular, Detroit Edison claims that the Dense Pack project is eligible for the exclusion for routine maintenance, repair, and replacement. The determination of whether a proposed physical change is "routine" is a case-specific determination which takes into consideration the nature, extent, purpose, frequency, and cost of the work, as well as other relevant factors. After carefully reviewing all the information you submitted in light of the relevant factors, EPA has determined that the proposed project is not "routine."

The purpose of the Dense Pack project, to significantly enhance the present efficiency of the high pressure section of the steam turbine, signifies that the project is not routine. An upgrade of this nature is markedly different from the frequent, inexpensive, necessary, and incremental maintenance and replacement of deteriorated blades that is commonly practiced in the utility industry. For instance, past blade maintenance and replacement of only the deteriorated blades at Detroit Edison has never increased efficiency over the original design. Accordingly, because increasing turbine efficiency by a total redesign of a major component is a defining feature of the proposed Dense Pack project, it clearly goes significantly beyond

both historic turbine work at Detroit Edison, and what would otherwise be considered a regular, customary, or standard undertaking for the purpose of maintaining the existing steam turbine units. The project also goes well beyond routine turbine maintenance, repair, and replacement activities for the utility industry in general.

The nature and extent of the work in question – replacement of the entire high pressure sections of the steam turbines for Units 1 and 4 at Monroe – suggests that the Dense Pack project is not routine. It would result in greater efficiency above the level that can be reached by simply replacing deteriorated blades with ones of the same design and, in addition, will substantially increase efficiency over the original design. Specifically, the Dense Pack upgrade would not only restore the 7 percent of the efficiency rating lost over the years at each unit but would improve the unit's efficiency by an additional 5 percent over its original design capacity. Accordingly, the proposed project represents a significant and major redesign and replacement of the entire high pressure sections of the steam turbines at Units 1 and 4 at the Monroe facility.

The frequency with which utilities have undertaken turbine upgrades like the Dense Pack project also indicates the nonroutine nature of the changes. The information provided by Detroit Edison, regarding past history at the Monroe facility, describes what is characterized as necessary maintenance, repair, and replacement of deteriorated turbine blades approximately every 4 years. During these overhaul periods, it is not uncommon for the company to replace up to several turbine blades at one time. It is common among other utilities to also perform similar turbine maintenance. However, Detroit Edison has not provided any information to suggest that a complete

replacement and redesign of the high pressure section of a steam turbine is conducted frequently at Monroe or at any other individual utility. Instead, Detroit Edison relies on its claim that projects "similar" to the Dense Pack project have been performed at a number of utilities. This information does not indicate that the replacement of the high pressure section of the steam turbine is frequent at the typical utility source; to the contrary, the only available information reflects that projects like the Dense Pack project have been performed only one time, if ever, at individual sources.

The cost of the Dense Pack project is significant and tends to indicate that this project is nonroutine. Detroit Edison expects the Dense Pack replacement to cost approximately $6 million for each turbine unit, for a total of $12 million. The EPA has rejected claims of routineness in past cases where the cost was substantially less than this figure. Moreover, Detroit Edison intends to capitalize the entire cost of this project, and EPA believes that a $12 million project that is 100 percent capital improvement indicates that it is a major undertaking.

Beyond the clearly significant absolute cost of this project, available information suggests that this expenditure far exceeds the cost typically associated with turbine blade maintenance activity. Detroit Edison provided only a summary of the total project costs for past maintenance and inspections at the facility, the total costs of which ranged from less than $1 million to a little more than $6 million. Although Detroit Edison did not provide any detail regarding what specific activities comprise these aggregated amounts, it acknowledges that it spent only $18,700, $33,100, and $7,900 to replace high-pressure rotors in three turbine projects in 1981 and 1982. Further, the

project is significantly more costly than simply replacing deteriorated blades today; Detroit Edison acknowledges that the Dense Pack upgrade would cost three times more than its alternative blade repair and replacement project. Accordingly, it appears that the costs associated with the Dense Pack project greatly exceed the amounts spent previously by Detroit Edison or that it would spend presently for the replacement of deteriorated turbine blades or rotors.

For the reasons delineated above, we conclude that the changes proposed by Detroit Edison are not routine. Detroit Edison's submissions do not demonstrate that project such as the Dense Pack project are frequent, inexpensive, or done for the purpose of maintaining the facility in its present condition. Instead, the source relies on two principal arguments: (1) It claims that this project is less significant in scope than was the activity in question in the 1988 applicability determination for the Wisconsin Electric Power Company (WEPCO); and (2) it alleges that EPA has interpreted the exclusion for routine activity expansively to exempt all projects that do not increase a unit's emission rate. EPA rejects both of these arguments, the former because both EPA and the U.S. Court of Appeals for the Seventh Circuit viewed WEPCO's activity as "far from" routine and thus this attempted comparison to WEPCO is unsuitable, and the latter because it is demonstrably incorrect. The attached analysis addresses these points in significant detail.

When nonroutine physical or operational changes significantly increase emissions to the atmosphere, they are properly characterized as major modifications and are subject to the PSD program. In general, a physical change in the nature of the Dense Pack project, which provides for

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the more economical production of electricity, would be expected to result in the increased utilization of the affected units, and thus, increased emissions. Notwithstanding the fact the Monroe units may be high on the dispatch order, the Dense Pack project would allow Detroit Edison to produce electricity more cheaply per unit of output, thereby creating an incentive to run Units 1 and 4 above current levels. Even a small increase over current normal levels in the utilization of the affected units would result in a significant increase in actual emissions of criteria pollutants. For example, in 1997, at the Monroe facility Unit 1 emitted approximately 14,000 tons of nitrogen oxides (NO_x) and 41,000 tons of sulfur dioxide (SO_2), and Unit 2 emitted 12,000 tons of NO_x and 35,000 tons of SO_2. Based on this information, if a one to five percent increase in operation were to result from the Dense Pack project, increases on the order of 160-800 tons of NO_x and 400-2000 tons of SO_2 would occur.

Detroit Edison, however, maintains that emissions will not increase as a result of the Dense Pack project. Specifically, the company contends that representative actual annual emissions following the change will not be greater than its pre-change actual emissions, because the Dense Pack upgrade will not result in increased utilization of the units. As you are aware, the PSD regulations (under the provisions commonly known as the "WEPCO rule") allow a source undertaking a nonroutine change that could affect emissions at an electric utility steam generating unit to lawfully avoid the major source permitting process by using the unit's representative actual annual emissions to calculate emissions following the change if the source submits information for 5 years following the change to confirm its pre-change projection. In projecting post-change

emissions, Detroit Edison does not have to include that portion of the unit's emissions which could have been accommodated before the change and is unrelated to the change, such as demand growth.

Under the WEPCO rule, Detroit Edison must compute baseline actual emissions and must project the future actual emissions from the modified unit for the 2-year period after the physical change (or another 2-year period that is more representative of normal operation in the unit's modified state). As noted above, Detroit Edison has not provided these figures to verify its projection of no increase in actual emissions, and should submit them to the Michigan Department of Environmental Quality prior to beginning construction. In addition, Detroit Edison must maintain and submit to the permitting agency on an annual basis for a period of at least 5 years (or a longer period not to exceed 10 years, if such a period is more representative of the modified unit's normal post-change operations) from the date the units at the Monroe Plant resume regular operation, information demonstrating that the renovation did not result in a significant emissions increase. If Detroit Edison fails to comply with the reporting requirements of the WEPCO rule or if the submitted information indicates that emissions have increased as a consequence of the change, it will be required to obtain a PSD permit for the Dense Pack project.

Finally, regardless of whether PSD review is triggered due to the Dense Pack project, Detroit Edison must meet all other applicable federal, state, and local air pollution requirements.

This determination will be final in 30 days unless, during that time, Detroit Edison seeks to confer with or appeal to

the Administrator or her designee regarding it. If you have any questions regarding this determination, please contact Laura Hartman, Environmental Engineer, at (312) 353-5703, or Jane Woolums, Associate Regional Counsel, at (312) 886-6720.

Sincerely,

/s/ original signed by
Francis X. Lyons
Francis X. Lyons
Regional Administrator

Enclosure

EXHIBIT 116

**BEFORE THE ADMINISTRATOR
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY**

IN THE MATTER OF MONROE ELECTRIC GENERATING PLANT ENTERGY LOUISIANA, INC. PROPOSED OPERATING PERMIT Proposed by the Louisiana Department of Environmental Quality	PETITION NO. 6-99-2 ORDER RESPONDING TO PETITIONER'S REQUEST THAT THE ADMINISTRATOR OBJECT TO ISSUANCE OF A STATE OPERATING PERMIT

ORDER PARTIALLY GRANTING AND PARTIALLY DENYING PETITION FOR OBJECTION TO PERMIT

On February 9, 1999, Ms. Merrijane Yerger, Managing Director of the Citizens for Clean Air & Water ("CCAW" or "Petitioner"), petitioned the Environmental Protection Agency ("EPA"), pursuant to section 505(b) of the Clean Air Act ("CAA" or "the Act"), to object to issuance of a proposed State operating permit to Entergy Louisiana, Inc.'s Monroe Electric Generating Plant in Monroe, Louisiana ("Monroe plant"). The proposed operating permit for the Monroe plant was proposed for issuance by the Louisiana Department of Environmental Quality ("LDEQ") pursuant to title V of the Act, CAA §§ 501-507, the federal implementing regulations, 40 CFR Part 70, and the State of Louisiana regulations, Louisiana Administrative Code ("L. A.C."), Title 33, Part III, Chapter 5, sections 507 *et seq.*

Petitioner has requested that EPA review, investigate, and make an administrative determination on the entire

matter of the proposed operating permit and planned restart of the Monroe plant, pursuant to section 505(b) of the Act and 40 CFR § 70.8(c). Petitioner alleges that the proposed operating permit is not in compliance with applicable requirements of the Act including Prevention of Significant Deterioration ("PSD") permitting requirements and New Source Performance Standards ("NSPS"). Petitioner also alleges that Entergy's operating permit application fails to adequately demonstrate compliance with hazardous waste disposal requirements under the Resource Conservation and Recovery Act ("RCRA").

* * *

condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR subpart I or 40 CFR 51.166." 40 CFR § 51.166(b)(2)(iii)(f); *see also* L.A.C. 33:III.509(B).

The purpose of this "increase in hours" exception was to avoid undue disruption by allowing routine increases in production during the normal course of business in order to respond to market conditions. In the preamble to the PSD rulemaking, EPA explained:

> While EPA has concluded that as a general rule Congress intended any significant net increase in such emissions to undergo PSD or nonattainment review, it is also convinced that Congress could not have intended a company to have to get an NSR permit before it could lawfully change hours or rate of operation. Plainly, such a requirement would severely and unduly hamper the ability of any company to take advantage of favorable market conditions.

45 *Fed. Reg.* 52676, 52704 (Aug. 7, 1980). The court in *WEPCO* explained further, "This exclusion . . . was provided to allow facilities to take advantage of fluctuating market conditions, not construction or modification." 893 F. 2d at 916 n. 11.

Analysis of whether restart of a facility constitutes a mere increase in the hours of operation or production rate must consider whether the proposed activity is of the kind intended to be covered by the provision. Specifically, EPA will look at whether the proposed change requires enhanced flexibility to avoid hampering a company's ability to respond to market fluctuations. In general, reactivation after long periods of shutdown, though obviously motivated by long-term changes in the market, is not a response to the same type of market fluctuations and does not merit the same permitting flexibility envisioned by the regulations.

Restart of a long-dormant facility also may not be entitled to coverage under the "increase in hours" exemption if it would disturb a prior assessment of the environmental impact of the source. In the preamble for the 1980 PSD rulemaking, after expressing its belief that Congress intended to allow certain facilities flexibility to respond to market fluctuations, EPA

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	CIVIL NO. 1:00CV1262
DUKE ENERGY CORPORATION,	)	
Defendant.	)	

EXHIBITS IN SUPPORT OF UNITED STATES RESPONSE TO DUKE'S MOTION FOR SUMMARY JUDGMENT

(Filed Mar. 31, 2003)

* * *

EXHIBIT 139

USA, et al. vs. Duke Energy Corporation 1:00 CV 1262
Laura Butler 12/10/2002

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Civil Action No. 1:00 CV 1262

UNITED STATES OF AMERICA,
Plaintiff,
v.
ENVIRONMENTAL DEFENSE, NORTH CAROLINA SIERRA CLUB, NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP
Plaintiff-Intervenors
v.
DUKE ENERGY CORPORATION
Defendant.

DEPOSITION OF LAURA BUTLER
(Taken on behalf of the Plaintiff)
Raleigh, North Carolina
December 10, 2002

* * *

[15] Q. Is it something that you actively encourage? Trying to get a sense of your working relationship with the sources.

A. Well, we have a good relationship with the sources, but I don't know how to answer your question. We don't advertise that we encourage it, but we do have conversations with somebody representing them.

Q. So in general if – strike that. When we were speaking before about a modification for PSD purposes, what sorts of things are you talking about when you say a modification for PSD purposes?

A. Basically I don't want to be – really would be better to look at the documents that define it, because I wouldn't want to be misquoted or misquote the documents. There are books that talk about this.

Q. Generally?

A. Changes that would basically increase emissions or change in a method of operation. Now the technical staff can give much more detail than that, and that would be preferable.

Q. Is it the sources' responsibility to come in for a permit or is the burden on Air Quality section to identify modifications?

A. The facility should be – would be required to get a permit modification if one has occurred, if a modification [16] has occurred that would trigger a permit action.

Q. Is it Air Quality section's burden to go out and identify those types of modification or does the Air Quality section rely on the facilities?

MR. COTTINGHAM: Object to the form. You can go ahead.

THE WITNESS: Could you repeat that?

Q. Is the burden on – sorry. Is it the responsibility of the Air Quality section to go out and affirmatively identify those modifications?

MR. COTTINGHAM: Object to the form.

THE WITNESS: We don't have the manpower to do that.

* * *

EXHIBIT 140

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Civil Action No. 1:00 CV 1262

UNITED STATES OF AMERICA,
Plaintiff,
v.
ENVIRONMENTAL DEFENSE, NORTH CAROLINA SIERRA CLUB, NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP
Plaintiff-Intervenors
v.
DUKE ENERGY CORPORATION
Defendant.

DEPOSITION OF MICHAEL PARKIN
(Taken on behalf of the Plaintiff)
Raleigh, North Carolina
December 10, 2002

* * *

[9] Q. During that time period did you ever receive PSD applications for changes being made to existing sources?

A. At the time I was environmental Engineer I, I don't recall ever reviewing actually a PSD permit application.

Q. I'm going to have you walk me through a typical inspection. When would the first contact with the facility

be made? Would it be made before the inspection or the day of the inspection?

A. At that time I would say I would show up with no prior contact.

Q. Where would you go when you got to the facility?

A. Usually to a reception office and then ask for the c ıct at that point.

Q. Once you met up with the contact, what would you to next?

A. I would inform the contact the reason I was there, I would show them a copy of the air permit and say I want to go through and look at the sources on your air permit.

Q. How would you look at the sources on the air permit, what would you do? Would you physically go see them?

A. Yeah, we would walk through the facility, look at the sources and associated control equipment as well.

Q. What were you looking for? What would you be looking for when you walk through a facility?

A. Some things would be operating data that had – just [10] looking to see if everything appeared to be functioning properly, also if there were any new sources that weren't on the permit as we walked through the facility.

Q. Anything else?

A. That would be pretty much the extent of it.

Q. Okay. The first thing you said is you would look for operating data I believe. What did you mean by operating data?

A. Well, with Duke, for example, it would be precipitator data, voltages, spark rates, that kind of thing. The other operating data may include, I don't recall, but generally speaking what boilers are operating at and what their output steam load, for example. They have passivity monitors. We check that type of data.

Q. You also said that at the inspection you made sure that the units were functioning properly; is that right, is that what you said? Okay. What did you mean by that?

A. One might be as simple as looking at the stack and see visually if you see any visible emissions that could be control devices or just see if there's physical problems such as dust leaking out of places or things like that.

Q. And you also said you would look to see if there's new sources?

A. Yes.

Q. And could you explain what you meant by that?

[11] A. Just going through a plant and if there's something shows up there that I see that's essentially not on the air permit, if it is not described on the air permit then I would look to see what it was and see if it might require air permitting.

Q. And what are some examples of what would be a new source at a utility that would strike that kind of questioning from you?

A. Perhaps, well, a boiler for example, or even storage silo or a bag filter or something like that that they might put up, something of that nature.

Q. If there was a new piece of equipment put inside the boiler, would that raise those types of questions for you all during the inspection?

MR. COTTINGHAM: Object to the form. You can answer that if you can.

THE WITNESS: A new piece of equipment inside the boiler. I would have to, I mean it might be hard for me to detect a new piece of equipment inside the boiler so I don't know.

Q. After you walk around through the facility, what would you do next for an inspection?

A. After done normally have an exit interview, perhaps an inspection, some type of file review or if there's any paperwork to look at.

[12] Q. What's involved with the exit interview? You said perhaps, so I wasn't sure if that's a normal but if you could just explain if there is an exit interview, what would be involved?

A. If there were any problems I found I would discuss that with them or if I had intended on issuing some sort of notice of violation I would discuss that with them. If I didn't intend on it, I would say okay, that's it.

Q. You said sometimes you do a file review. What would that involve?

A. It is a little – I can answer it more too to the extent how I do it now verses. I mean this is of course many years ago.

Q. Right.

A. Obviously much more paperwork involved in what I. do now.

Q. How about when you were an Environmental Engineer I? What did you do?

A. The only thing I can, with utility perhaps looking at the – discussing, have some discussion of their malfunction abatement plan and coal sampling or whatever they use to show compliance with say sulphur standards or something like that.

Q. Back to when you're walking through the facility, if a unit is shut down, how would that affect your [13] inspection?

A. I would say at that time if it was shut down pretty much moved on to the operating units.

Q. As part of this inspection, did you ever back when you were an Environmental Engineer I, did you ever ask about all the work that had been done to the facility since last inspection?

MR. COTTINGHAM: Object to the form.

THE WITNESS: No.

Q. Would sources ever provide you documentation of all the work that had been performed at the facility since last inspection when you were an Environmental Engineer I?

A. No.

Q. Mr. Parkin, I am now handing you what I have marked as Plaintiff's Exhibit 694. You can take your time to look it over and let me know when you're ready for questioning.

A. Okay.

Q. First of all, could you identify for the record what is Exhibit 694?

A. It is an inspection report at Duke Power Cliffside steam station for the inspection that took place on August 26, 1992.

Q. Were you present for this inspection?

A. Yes.

Q. Did you write this inspection report?

[14] A. Yes, I did.

Q. Do you remember this inspection?

A. Specifically, no, I don't remember, it.

Q. Besides Cliffside were there any other Duke facilities that you inspected?

A. No.

Q. During what time frame have you inspected Cliffside?

A. This may have been the – this I believe was the – may have been my first compliance inspection at the facility. I don't know that for sure but this would have

been in the neighborhood of when it would have been, and I continue to inspect them today.

Q. When you were just identifying this you called it a compliance inspection. Why did you use that terminology?

A. Maybe because I think of things in terms of the new EPA compliance monitoring strategy. I don't know. We do inspections to evaluate compliance. I guess that's why.

Q. Compliance with what?

A. Their air permit applicable regulations.

Q. When you inspected Cliffside around this time frame, do you remember seeing work being done to the units?

(Off-the-record discussion.)

(Interruption for technical problems).

THE WITNESS: Are we preceding at this point?

[15] MR. BERNSTEIN: Do you remember the question?

THE WITNESS: Yes, about work being done. I don't specifically remember August 26, but during this time period I recall going there and work was being done in the areas of units 1 through 4.

Q. Did you have any discussions about this work?

A. I don't recall.

Q. Did you ever discuss PSD with anybody at Duke about this?

A. No, I did not.

Q. Besides seeing the work, did you gain any other information about what work was being done?

A. There was no detail. My understanding that they were, the units had been out of service and they were doing this work in preparation to bring them back online.

Q. How did you get that understanding?

A. I'm sure there was at least some conversation as to, you know, generally as to what was going on. But as far as specifics, I couldn't tell you.

Q. Did you ever do an evaluation for possible changes in capacity due to the work that was being done?

A. No, I did not.

Q. How about a – did you ever to do an evaluation for changes in efficiency?

A. No.

[16] Q. For possible changes in capacity utilization?

A. No.

Q. Did you ever ask them how much the work they were doing cost?

A. No, I did not.

Q. Did you ever ask them how frequent they have to replace the components that they were replacing, if you saw components being replaced?

A. No, I did not.

Q. Did you ever discuss the nature of the work?

A. Not in any detail.

Q. Did you discuss the extent of the work?

A. No.

Q. Did you discuss the purpose of the work?

A. Only to the extent I knew it was part of bringing these units back online.

Q. Did you evaluate the work you saw for PSD applicability?

A. No.

Q. Okay, focusing on Exhibit 694, do you see Number 6, the last sentence at the bottom of that exhibit?

A. Yes.

Q. What does that sentence mean in relation to PSD regulations?

A. Nothing. That regulation is not addressed in that.

[17] Q. Are other regulations addressed in that statement?

A. Pardon?

Q. Are other regulations addressed in that?

A. Yeah, the ones specifically listed on there. But that was, like I said, that's to the best of my knowledge they were in compliance and I wouldn't call it a definitive statement of compliance either, at least based – I did not see anything on the inspection that would lead me to believe they were out of compliance anyway with those regulations listed.

Q. But this wasn't even meant to be a definitive statement that they were in compliance with these regulations?

MR. COTTINGHAM: Object to the form.

BY MS. BEHLES:

Q. Is that what you just stated?

A. I cannot just by looking at it definitively say they were in compliance.

Q. And when you say in compliance, you mean with the regulations listed on Number 6; is that right?

A. That's correct, with the possible exception of say the physical regulation which I can look at and make an evaluation of.

Q. Can you look at a boiler and make a PSD evaluation as an inspector?

[18] MR. COTTINGHAM: Object to the form.

THE WITNESS: No.

Q. Why not?

A. It is just there is not enough information to. I mean, it requires a lot of, I would say, document review of files and documents and things like that to make a PSD evaluation.

Q. Earlier you mentioned that you inspect a large number of industries; is that right?

A. Yes, that's correct.

Q. Is that true for other inspectors?

A. Yes.

* * *

[28]Q. Have you always had a good relationship with the people at Cliffside?

A. Yes.

Q. Who do you report to at your regional office?

A. Paul Mueller.

Q. Is he the regional supervisor?

A. Yes, that's correct.

Q. Who did you report to in 1992 when you did this first inspection that's marked indicated by Exhibit 694?

A. That would also be Paul Mueller.

Q. Has he been the regional supervisor the entire time?

A. Yes.

Q. When you go to a facility like Cliffside to do an inspection, do you generally show up without any prior contact?

A. At that time, yes.

Q. And by "that time" you mean of the '92, '93 time frame?

A. Yes.

Q. And do you now more frequently notify them you're coming?

A. More frequently now. That's across the board just [29] records review we do and we need appropriate personnel there to be able to do it.

Q. The main reason you started notifying facilities that you're coming is so that they can get all the records together you want to look at and have somebody there to help you go through them?

A. Yes, exactly.

Q. When you do an inspection, do they make all the records available to you that you want to look at?

A. Yes.

Q. If you called Cliffside in advance or show up by surprise and say I want to look at all the records on this subject they make them available to you?

A. Yes.

MS. BEHLES: Object to form.

Q. You were asking questions or answering questions of the lawyer about how to evaluate PSD applicability, and you said it would take a lot of documents review but the documents you would review, and if you wanted to and needed to do that, would be documents that they would have to make available to you?

MS. BEHLES: Object to form.

Q. Correct?

A. Yes.

Q. When you go through your inspection, and let's just [30] focus now on Cliffside, the Duke Energy facility

as opposed to something general. Let's be specific about that. When you go through those and do inspections there, if boilers are shut down that's actually a time when you can go inside the boiler if you wanted to do that, isn't it?

A. I couldn't answer that question.

Q. Well, you don't go inside them if they are operating?

A. Oh, certainly no.

Q. So if there was any time you wanted to go inside them it would have to be when they were shut down?

A. It would be when they were shut down, but whole set of issues there.

Q. You're just saying – are you saying you've never actually done that?

A. No, I have not.

Q. Are you saying there are a whole set of issues? Is there any reason why you couldn't have done that if that's what you, wanted to do?

A. There may be as far as confined space entry and that kind of thing. I don't know what sort of OSHA regulations might apply in that scenario.

Q. But assuming you got all the correct safety training and had the right equipment and had somebody there to guide you, you don't know of any reason why you couldn't [31] go?

A. Conceivably I could.

MS. BEHLES: Object to form.

Q. You said in the '92, '93 time frame some of the boilers at Cliffside were shut down. Do you remember which ones they were?

A. Couldn't tell you specifically unless it is mentioned in the record.

Q. This first exhibit says Units 3 and 4 went offline, and I'm reading paragraph 2 of Exhibit 694, says Units 3 and 4 went offline and remained offline at the time of the inspection. And you said you saw the work being done on some of the units at some time, and I just want to be more specific. Did you see work being done, at Units 3 and 4 at the time of this inspection in 1992?

A. Do not recall.

Q. But you do recall see being work done on those units?

A. Yes, there are four boilers right there together and there was work being done in that area. I can't recall specifically which boilers were being worked on when I was there.

Q. Just so we will all understand, Cliffside 5 is a large unit on one side of the river, Cliffside 1 through 4 are smaller units that are on the opposite side of the river?

[32] A. I think they are on the same side of the river, but –

Q. I thought they were on different sides.

A. I would say different sides of the large coal storage pile there.

Q. Okay, close enough. So you can go to Cliffside 5 and then takes a little time to get over to the other?

A. Yes.

Q. Cliffside 1 through 4. But you said that you knew that work was being done on Cliffside Units 1 through 4 in the '92 '93, '94 time frame when you were going –

A. Yes.

Q. And there was nothing to keep you from going to look and see exactly what that work was, was there?

MS. BEHLES: Object to form.

THE WITNESS: No.

Q. In fact you saw the work being done, didn't you?

A. That's correct.

Q. Did you see parts of the boiler disassembled and large components being replaced in the boilers?

A. I could recall seeing parts laying around. I don't remember specifically anything else other than there was, there was quite a bit of activity there.

Q. And this is on Units I through 4?

A. Yeah, some of them. As I mentioned I don't [33] specifically remember which ones.

Q. If you saw something that you thought might trigger PSD, then your normal process was to, I think you said, to follow up or investigate it further; is that right?

A. That's correct.

Q. And if you actually found something that you thought constituted a violation, you could issue a notice of violation or an NOV, couldn't you?

MS. BEHLES: Object to form.

A. That's correct.

Q. In fact you issued an NOV at Cliffside, haven't you?

A. I don't recall if I have or not.

Q. But, you know that's something you could do?

A. Yes.

Q. Now when you prepare your inspection reports, has Mr. Mueller reviewed the inspection reports?

A. He's reviewed some of them. I would not know if he reviewed these reports specifically.

* * *

[36] Q. So following up what we said earlier, when new people came on board at Cliffside for Duke Energy you would go and get to know them?

A. Yes.

Q. And then at the same time you inspected Units 1 through 4 it looks like. Just looking at the last sentence of that paragraph?

A. Yes.

Q. Now turn to the second page of that exhibit and there's a paragraph which starts near the top right after the list of people of Kim Kelley, Mike Hager, Marty Beam

and Sam Sojourner. It says they are expecting to begin firing low Nox burners in Units 3 and 4 in the next few months. Do you see that paragraph?

A. Yes.

Q. And that paragraph ends by saying, "A three week outage is scheduled for Unit 5 during 1997 and eleven week outage is scheduled for Unit 5 in 2001." Do you remember a discussion about what work was going to occur during that time?

A. No, I do not.

Q. And then it says, "Units 1 through 4 we're essentially rebuilt before they were brought online over the past five years." That appears to be information they gave you at the time of this inspection if you didn't know it [37] already?

A. Yeah. I cannot recall.

Q. It was either something that Duke Energy people told you or something you learned from seeing the work or something you learned from looking at the documents or some combination of that? Correct?

A. I think that's a fair assessment.

Q. As of November 12, 1996, if you didn't know earlier you knew then, that Units 1 through 4 had essentially been rebuilt over the past five years, correct?

A. Yes.

MS. BEHLES: Object to form.

Q. Look at the next inspection report. It is March 12, 1997 is the next one in the stack. Do you see that? Has Bates numbers 11795?

A. Yes, I see that.

Q. Let me just direct your attention to the first paragraph. This time it says, "On March 12, 1997 Troy Harrison and I visited the Duke Power plant to observe a source test for particulate emissions from Unit Number 5." Who was Troy Harrison?

A. Troy Harrison is, at least at that time, was an Environmental Technician 5. He was responsible for doing small source inspections and complaint investigations in Rutherford County.

* * *

[41] Q. Did anyone at EPA ever communicate with you about any interest or concern about what had occurred or was occurring at Duke's facility at Cliffside?

A. Not with me.

Q. Look at the last inspection report that's dated July 29, 1999 that ends in Bates numbers 11788. The conclusion of that report in paragraph 6 is, and this is talking about the Cliffside facility, the facility appeared to be operating in compliance with applicable requirements. Correct?

MS. BEHLES: Object to form.

BY MR. COTTINGHAM:

Q. That's what you wrote?

A. That's what the sentence states.

MR. COTTINGHAM: Thank you. That's all the questions I have.

MS. BEHLES: Okay. I just have a few more questions for you.

RE-EXAMINATION

BY MS. BEHLES:

Q. When you said you saw work being done at Cliffside, did you say you saw – how did you know work was being done at Cliffside?

A. There were crews of people. The significant [42] project I guess at that time there wasn't really as a formal a process for initiating the inspection as it become later when I met with the corporate folks and all that. There were times when I showed up to Units 1 through 4 and went to – I didn't go through the reception process in this case. I went and tried first would try to locate Steve Porter in his office; and there are times when I went out to the area where all this work was going on to try and find or see if I could finds someone who knew where he was. And so during this process I was out where Units 1 through 4 were and could see the work going on.

Q. Can you identify all the parts of a boiler by looking at a boiler?

A. Not all the parts but some of the parts, yes.

Q. Are you required to go into boilers that are not, that are shut down?

MR. COTTINGHAM: Object to the form.

THE WITNESS: No.

Q. Are you encouraged to go into boilers that are shut down?

MR. COTTINGHAM: Object to the form.

THE WITNESS: We are basically told not to go into confined spaces.

Q. Referring back to what Mr. Cottingham has identified as Exhibit 901. Can I first have you turn to –

[43] A. 901?

Q. You got it okay?

A. I got it.

Q. To the last page of that exhibit. It ends in the Bates number on the corner is 1790.

A. I got it.

Q. Did you mean for that sentence to be a PSD applicability determination?

MR. COTTINGHAM: Object to the form.

THE WITNESS: When I write that sentence in my mind I'm referring to the list of applicable regulations that are in the air permit.

Q. When you write the sentence why do you include the word "appeared"?

A. As I mentioned before, in the business of air quality, without doing rather extensive and complex testing you really can't make definitive statements as to whether a facility is in compliance. So I would not write and guarantee that everything was in compliance just from looking at it.

Q. When you were discussing the file review that you do in inspections, do you perform that file review as part of inspections to determine if boiler rehabilitation work triggers PSD?

MR. COTTINGHAM: Object to the form.

[44] THE WITNESS: No.

Q. And why not?

A. This is the context of now or in 1992 or '93?

Q. First let's start with 1992-93 and then we can discuss now.

A. One thing, there's probably not much in the files on what was done. And I would say as far as really to modifications at the facility are normally reviewed in the context of an air permit application. And at that time I guess I just didn't think to inquire more about what was going on.

Q. Do you know whether or not if you – well, strike that. And what do you do now? When we were talking the file review. Is it any different now?

A. In what way?

Q. Do you perform that file review as the file review that you perform as part of inspections, do you do that to determine if boiler rehabilitation work triggers PSD?

MR. COTTINGHAM: Object to the form.

THE WITNESS: I would say now if I was looking at a similar or project for somebody that was rebuilding the first, first thing that would pop into my head is get information on how much it was costing and

whether emissions, there would be the bottlenecking quote in any way or something of that nature.

[45] Q. How long has that been your understanding or your practice?

A. I couldn't state specifically. I was probably more regulatorally aware of the NSPS requirements as far as reconstruction if I recall around '94 or so. That's just guessing though.

Q. How about for PSD requirements? Would you perform a file review as part of your inspection to determine if that boiler work triggered PSD?

A. As part –

MR. COTTINGHAM: Objection to form.

THE WITNESS: As part of inspection, no.

Q. Would you do that currently?

MR. COTTINGHAM: Object to the form.

THE WITNESS: That's a difficult question. It would have to be the scenario. I might.

Q. If I could have you look at Exhibit 694, the first page of Exhibit 901?

A. Which one are we talking again? 8-26-92.

Q. Yes.

A. Okay.

Q. And in reference to paragraph number 5, was it Duke's duty or obligation to tell about that violation?

MR. COTTINGHAM: Object to the form.

THE WITNESS: In essence, yes, because they are [46] required to report their annual average capacities, which is reviewed under in the stationery source compliance branch as reports.

Q. Is it the source's duties to go to the state for a PSD applicability determination?

MR. COTTINGHAM: Object to the form.

THE WITNESS: It is a difficult question. It would be my opinion if they suspect there is a PSD issue it is their duty to come to the state.

Q. Have you ever given any indication to Duke that the boiler work that you saw did not trigger PSD?

MR. COTTINGHAM: Object to the form.

A. No.

MS. BEHLES: I think that's all. Thank, you for your time.

RE-EXAMINATION

BY MR. COTTINGHAM:

Q. Mr. Parkin, you never went back after you came to understand that you might look at cost and other factors in connection with work that had been performed, you never went back and tried to collect that information on Cliffside 1 through 4, did you?

A. No, I did not.

MR. COTTINGHAM: Thank you.

* * *

EXHIBIT 141

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Civil Action No. 1:00 CV 1262

UNITED STATES OF AMERICA,
Plaintiff,
v.
ENVIRONMENTAL DEFENSE, NORTH CAROLINA SIERRA CLUB, NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP
Plaintiff-Intervenors
v.
DUKE ENERGY CORPORATION
Defendant.

DEPOSITION OF MICHAEL LANDIS
(Taken on behalf of the Defendant)
Raleigh, North Carolina
December 11, 2002

* * *

[15] Q. Did the people you had contact with at Duke Energy during all the years you inspected there, did they always seem interested and sincerely interested in complying with environmental regulations and rules?

MS. BEHLES: Object to form.

THE WITNESS: To the best I could tell, yes. Like I say, I never have any problem getting the information I needed. And generally the information I needed was

for compliance issues anyway, and it was always made available.

Q. I'm going to show you what we marked as Exhibit 902 and those are inspection reports for the Riverbend facility that you prepared?

A. Okay.

* * *

[17] A. Here is another one too by Therman. It is 001326, 001327 and 28. I can tell my writing. It's bad. Okay, yeah, all these except for the things by Therman Horne are mine, yes, that's correct.

Q. And they start – the first one is dated August 16, 1978?

A. That's correct.

Q. And the last one is dated, looks like, February 20, 1991.

A. Yes, it appears to be 1991, yes.

Q. Let me ask you to look at the one that's dated – we will start here at June 5, 1989?

A. Do you have a page?

Q. It has a Bates stamp number of 7129 at the bottom and since it is a 1989 it is near the back.

A. What's the date of the thing again?

Q. June 5, 1989. You signed it on June 14?

A. June 5, 1989, yes, I'm at the one.

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Q. That's an inspection that you conducted on June 5, 1989 at the Riverbend facility?

A. Yes, sir.

Q. It says, "This facility is an electricity generating plant. There are four boilers at the plants, 6, 7, 8 and 9." Is that the way you remember Riverbend?

A. Yes, sir.

[18] Q. And then you say, "only boiler number 8 was in operation during this inspection."

A. Uh-hum.

Q. "The other three boilers are in the plant modernization program."

A. Yes, sir.

Q. Tell us what you saw or knew about the Duke Energy plant modernization program?

A. I really don't recall what I saw. I just really don't remember a whole lot about – my understanding of the plant modernization program was that Duke Power was to increase, was trying to increase the efficiency of the boilers. And my understanding of that, whether incorrect or correct, my understanding of that was to try to get more generation capacity out of the same amount of coal. And also my understanding was that there would be no increase in BTU heat input. It was just a matter of however you get more power, I don't know. But that was my understanding of the plant modernization program.

Q. Did you have an understanding that that program had been approved in some way by headquarters in Raleigh?

A. Well, I hadn't really thought about that until during the interviews Keith mentioned that there was headquarters that said that was, headquarters being down here in Raleigh, and the division or the department had said [19] that that was okay, and that said it was okay to do that. That's about all I know about that memo. I don't recall seeing the memo specifically. And so and I'm sure Keith, and I don't recall Keith ever saying it but I'm sure he did at some time, that said it was okay. And I never gave it any more thought.

Q. Keith Overcash was your supervisor at the time of this inspection?

A. Yes, sir. He was regional supervisor at the time yes, sir.

Q. And now is Director of Division of Air Quality?

A. Yes, sir.

Q. When you saw the plant modernization work at the three boilers, did you see activity and see tubes and parts on the ground or around or being installed?

A. Yes. There was a lot of stuff on the ground. I think in part 2 I think they were trying to get rid of asbestos at the same time. It was kind of concurrent sort of thing. There was a lot of stuff laying around on the floors, tubes and things. But like I say, once in my impression was it was okay to do that, I really didn't pay a lot of attention to it. It wasn't something I needed to be concerned about.

* * *

[21] Q. But at least appears from these inspection reports that Mr. Cheng's the one who did the inspections at Riverbend during that time?

A. Like I say, all I can tell you, that's his signature and at least that's the way I recall his signature.

Q. And he's dated each inspection beside his signature?

A. Yes.

Q. Let me just ask you to look at the first one which is November 24, 1986 in the first paragraph. It says, "None of the units of this power plant were in operation during my visit. Unit Number 6 and 7 had been put into the plant modernization project in 1989." Is that what he wrote then?

A. That's what it says, yes, sir.

Q. And if you look at the very next report, the one dated May 4, 1987, he dated it when he signed it May 13, 1987. Again in paragraph 1 it says, "Units Number 6 and 7 have been put into the plant modernization plan until 1991 and 1992."

A. That's what it says.

Q. The next report, which is dated looks like June 5, 1987 is when he signed it. In the second paragraph he says, [22] "Units 6 and 7 are currently in the plant modernization program and not expected to be in operation until 1991 and 1992."

A. That's what it says.

Q. And the next report, which looks like February 25, 1988, he says there, "Units 4, 6 and 7 have been put into the plant modernization plan until 1991 and 1992."

A. That's what it says.

Q. And then the final report by Mr. Cheng dated October 12, 1988 says "Units 4, 5 and 7 have been put into the plant modernization plan until 1991, '92."

A. That's what it says.

Q. Look also just one more minute at his reports. All of them have a paragraph that conclude with a sentence that says either the facility is considered to be in compliance with the applicable regulations or it says in some cases "PSD NSR, and NESHAP do not apply."

MS. BEHLES: Object to the form.

THE WITNESS: That's what it says.

Q. You also inspected at the Bucks station I think we said?

A. Yes, sir.

* * *

[33] EXAMINATION

BY MS. BEHLES:

Q. Mr. Landis, my name is Deborah Behles. I am hear representing the Department of Justice. I have a few follow up questions for you this morning.

A. Yes, ma'am.

Q. When you would go on inspections of Duke facilities, did you ever talk about PSD issues?

A. Not that I recall, no, ma'am.

Q. Did Duke ever talk about PSD issues on these inspections?

A. Not that I recall, no, ma'am.

Q. Do you know whether any other inspectors ever discussed PSD issues on their inspections?

A. No, I don't know whether they did or not.

Q. Do you know what happened on inspections that you did not attend such as the ones by – the ones that we have that you've seen in these exhibits?

A. No, I wouldn't know. The only thing I would know is what was in the report itself. That's the only thing I could tell you because it is generally what you wrote your report from, the notes that you took during the inspection itself.

Q. Did you ever do any emission calculations when you went on an inspection?

[34] A. No.

Q. Did you ever inquire about the cost of the work that was being done when you went on an inspection?

A. No, I did not. I don't recall doing that. I may have asked a question but I just don't recall that.

Q. Did you ever ask about the frequency of the components, of how frequent the components were replaced in the boiler that were being worked on?

A. No, ma'am, I didn't.

Q. Did you ever ask about the nature of the work in your inspections?

A. I may have talked about it to like during the stack test, you're standing up on the roof and just watching the test go on and you just talk; and I may have talked with plant people about what they were doing and that sort of thing. But that was just kind of general conversation with maybe one of the welders or something, just to have something to talk about. Other than that, that's about all I remember.

Q. Did you ever do any netting analysis on any of these inspections?

A. No, ma'am, I did not.

Q. Earlier you mentioned that on these inspections your contact was generally the precipitator, is a precipitator engineer?

A. He would have been one of the contacts, one of the [35] contacts. Generally when we did an inspection we would say hello to the plant manager, and then one of the plant engineers, and generally the engineer that was assigned to supervise the operation of the precipitators, would go along with us because we eventually wind up there anyway. Rather than trying to run him down 30 minutes after we started, it is easier to take him with us. And that's generally – and then when we have a closing interview and let the plant manager know if we observed any problems and what those problems might have been. And if not, we say everything looked like it was okay to us. That's kind of a quick overview of an inspection.

Q. On the inspections that you went on that Mr. Cottingham showed you in these exhibits up in front of

you, was the focus of these inspections to look at particulate matter related issues?

MR. COTTINGHAM: Object to the form.

THE WITNESS: Well, like I said, a lot of these are stack test observations. But generally the inspections, whenever we would do inspection, generally yes, I would say that it was related to particulate, because ESP doesn't control sulphur dioxide or gaseous emissions. And that's what we looked at in general was to make sure the operation of the precipitators was within what they should have been. And we looked at visible emissions, too, and that again is in [36] general of particulate emissions.

Q. You mentioned that you saw some work being done at some of the inspections that you went on. Did you know the specifics of all the work that was being done?

A. No, I did not know the specifics, un-unh.

Q. When you're on an inspection, can you determine whether a facility is in compliance with the visible emissions limit by looking at the stack?

A. Yes, sir. Yes, ma'am, I'm sorry. I apologize. Yes, ma'am. I'm certified to read visible emissions, and I was during the time that I was performing these inspections as well.

Q. Can you determine if a boiler is in compliance with PSD by looking at the boiler?

A. By – can you define that a little more? Do you mean by just – I really don't understand what you mean. If you could define that a little better for me, appreciate it.

Q. By just looking at the boiler and the work that is being done, can you determine on an inspection the PSD is triggered?

A. No.

MR. COTTINGHAM: Object to the form.

A. I am sorry. I should have waited. No, you can't.

Q. And why not?

A. PSD is not a regulation that is easy to interpret. [37] You got to do some calculations and that sort of stuff. You got to do a lot of stuff to determine generally whether a facility is subject to PSD or not. And during inspections we didn't do calculations and those kinds of things. During an inspection in general, just from the inspection and looking at a boiler, you couldn't say it is subject to PSD or not.

Q. Earlier when you were talking to Mr. Cottingham you mentioned that you had an understanding of the PMP program, that they were trying to use the same amount of coal to increase the efficiency?

A. That's just my impression. If someone says they are trying to increase the efficiency of a boiler or whatever, I just kind of maybe made an assumption that that's what they were trying to do. I never really talked about it. But it just seemed like you're increasing the efficiency of something that seems like a good idea at least from the surface.

Q. And where did you get that understanding?

A. Oh, just, you know, in talking with the plant people during inspections and asking a few questions

about the PMP program, there was the understanding I got.

Q. Earlier you also mentioned that you thought Keith Overcash had okayed –

A. No, it wasn't Keith. It was I think the Director of Air Quality probably had some input. And this is using [38] Keith's words from the interviews that we had previously. I didn't directly recall that until he started mentioning that and I thought, oh, yeah, that is right. That the department secretary, I don't remember who that was, said that it was okay. And so, like I say, those guys say it's okay, it is fine with me.

Q. What interviews are you referring to?

A. The interviews that we had, I had with – I apologize. I've forgotten your name.

MR. COTTINGHAM: Tom Cottingham.

THE WITNESS: And the other fellow that was on at the Winston-Salem office. That was during the interview and Keith mentioned, Keith was there and he mentioned that particular memo from, I think it is, Paul Williams. I don't remember. But that's the one he mentioned. And I thought, yeah, we wouldn't have said – we would probably questioned it a lot more if we had not had something like that from the departments. And that would have made sense. If you go do an inspection and something is going on like that, you're going to ask a lot of questions. I don't ever recall asking any questions about why are you doing this, that sort of thing. When he said that was – yeah, that made a lot of sense that I didn't ask any questions about what was going on and why they were doing it until – that's the reason I didn't ask those kind of

questions during inspection. Because I would [39] ask those kinds of questions, I would have asked those kinds of questions if something hadn't been cleared or I felt like it was okay.

Q. If I could show you what's been previously marked as Exhibit Number 6. Take your time to look through it and let me know when you're ready for some questions on that exhibit. I just want to note for the record, the copy that I handed him actually had a notation that says "Evans" on the bottom left-hand corner. And that was written by my co-counsel. Not part of the document.

A. Okay. I've read the, I guess it is a, letter to Mr. Helms from Duke Power.

Q. Okay. And can you read the second letter as well?

A. Oh, okay. I'm sorry.

Q. Oh, no.

A. Okay.

Q. Is the correspondence in Exhibit Number 6 the correspondence you were referring to that was discussed during this interview you had with –

A. Well, Keith mentioned this memo. I don't ever recall seeing it. It is kind of one of those things that headquarters says it is okay, and Keith would say it is okay. And I don't recall seeing the memos specifically. I really don't.

Q. But is this Exhibit Number 6 the memo that Keith [40] was referring to?

MR. COTTINGHAM: Object to the form.

THE WITNESS: I would assume it is. That's all I can tell you. I would assume that it is.

Q. Do you know whether Duke ever informed North Carolina about any work being done to the units during the PMP projects after this letter?

MR. COTTINGHAM: Object to the form.

THE WITNESS: I don't know. I really don't.

Q. Do you know whether Ying Pong Cheng ever did a PSD evaluation when he went on inspections?

MR. COTTINGHAM: Object to the form.

THE WITNESS: I am sorry.

MR. COTTINGHAM: That's okay, go ahead.

THE WITNESS: I don't know. You asked if we did one during an inspection?

Q. Uh-hum.

A. Like I said, PSD is too complicated to sit down and do that during an inspection. You have to sit down and do a lot of calculations and that sort of stuff and look at a lot of information to make the determination on PSD. That's not something that we would do in general during an inspection, just too complicated.

MS. BEHLES: I have no further questions.

RE-EXAMINATION

[41] BY MR. COTTINGHAM:

Q. Mr. Landis, if you saw something during an inspection which you thought might trigger PSD, you would then investigate that further outside the inspection period but you would go back to your office and do other things to investigate that further?

A. Well, even during an inspection I don't know that just – what we generally look for is stuff that's not in the permit; and if it is not in the permit, we ask questions about it and we investigate further. And it is really difficult to say when you go out and do an inspection that might be a PSD problem. You say, well, that's unusual and different, but you can't say during the inspection whether PSD applies or not; and you would have to go back and gather more information to make the determination. Just can't do that.

Q. And that was my point. If you see something that raises a question about whether –

A. You do further investigation, that's correct. Yes, sir.

Q. And if you wanted to, with the Duke Energy facilities in particular, if you wanted to find out information like the cost, frequency, nature, extent and purpose of work that you saw going on, there were documents that you could get from Duke Energy and people you could talk [42] to at Duke Energy who would give you that information, correct?

MS. BEHLES: Object to form.

Q. If that's what you wanted to find out?

MS. BEHLES: Objection.

THE WITNESS: Yes. My experience has been if we need more information, we ask for it. And most companies are generally forthcoming in giving us the information we need so we can make a proper determination. And we always – if we don't get enough information the first time, we keep asking until we get the right amount of information to make that determination. We don't want to do a PSD applicability determination without all the information. You got to have all the information to be able to do it right.

Q. That's right. Whenever you asked for information from Duke Energy for purpose, they have always been forthcoming and given it to you?

A. Yes, sir, they have.

MS. BEHLES: I was going to object to form.

THE WITNESS: But yes, they have.

MR. COTTINGHAM: That's all the questions I have.

* * *

EXHIBIT 142

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Civil Action No. 1:00 CV 1262

UNITED STATES OF AMERICA,
Plaintiff,
v.
ENVIRONMENTAL DEFENSE, NORTH CAROLINA SIERRA CLUB, NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP
Plaintiff-Intervenors
v.
DUKE ENERGY CORPORATION
Defendant.

DEPOSITION OF THOMAS McMANUS
(Taken on behalf of the Defendant)
Raleigh, North Carolina
December 11, 2002

* * *

[7] Q. So you've been in Air Quality since '91 or '92?

A. Yes, sir, somewhere in that neighborhood.

Q. Have you been conducting inspections during that entire time you've been in Air Quality?

A. Yes, sir.

Q. And that includes compliance inspections that you've conducted at the Duke facilities at the Allen, Buck, Marshal and Riverbend?

A. Yes, sir, it does.

Q. I'm going to ask you about those inspections in a minute, but first let's talk more generally and just focusing on those Duke Power plants. Do you get to know the Duke employees in the course of doing those inspections?

A. Yes, sir.

Q. And get to know people who supervise the employees [8] at the plants?

A. Yes, sir.

Q. Tell us just in your own words what appears to you to be the attitude of the Duke employees towards complying with environmental rules and regulations.

A. It's been my experience that the environmental coordinators who are located at the site who is responsible for all environmental programs at each plant as well as their supervisor and also their support group have been very open and forthcoming and not only accommodating our inspections but providing answers or information that we had regarding any operations or regarding to air permit at that facility.

Q. Have they always seemed seriously interested in understanding what they had to do to comply with the law?

A. Yes, sir.

MS. BEHLES: Objection to form.

Q. And seriously interested in trying to comply?

MS. BEHLES: Objection to form.

THE WITNESS: Yes.

Q. Have you had occasions when you had to ask them for more information about something or try to get more documents or just more information orally from them?

A. Yes, sir.

Q. Have they always provided you whatever documents and information you asked for?

[9] A. Yes, sir.

Q. Let me ask you something more specific. When you've seen work being performed at Duke facilities and let's talk about work that's maintenance, repair or replacement work, if you wanted more information about the nature or extent or purpose or frequency or cost of that work, is that something that would be available to you from Duke Energy that you could get?

MS. BEHLES: Objection to form.

THE WITNESS: Yes, sir.

Q. I'm going to show you what we marked as Exhibit 909, Mr. McManus. I want you to look at that for a minute and see if those appear to be inspection reports that you signed in connection with inspections at the Duke Power Allen plant starting in 1994 and going through April 19, 2000?

A. I've had this cold a while. These appear to be copies of the inspections and reports that I prepared.

Q. Let me ask you to just look at one first that's dated July 14, 1995. I think it is the third one in the stack. You can take that clip off if it helps you. Is that the July 14, 1995?

A. Yes, sir.

Q. There's a – okay, let me look at that because there are two that date. Look at the next one. There's another one that has the same date. Is that it?

[10] A. Yes, sir, this one.

Q. That's right. That's the one I want to ask you about. I want to focus on the last paragraph of that report. It says, "It should be noted that during this site visit Mr. Don Scroggs of Duke Power company accompanied the writer to observe an unpermitted 110 above ground number 2 oil storage tank." Do you remember that event?

A. Yes, sir.

Q. Tell us what happened there.

A. I remember this issue because we was looking at NSPS subpart KB applicability at that time and we were discussing this issue to determine if it was applicable.

Q. And was this a storage tank that you saw that – to which NSPS might apply?

A. Yes, sir.

Q. And did Duke Energy cooperate fully with you in trying to investigate that issue?

A. Yes, sir. They provided the information that I requested in order to make that determination.

Q. And did you eventually make a determination about whether NSPS applied?

A. Yes, sir, best of my knowledge we did make that determination. I don't remember exactly if it was applicable or not, but we did make that determination because I do recall reviewing that and discussing it at that time with my [11] regional supervisor.

Q. How did this above ground storage tank come to your attention?

A. If I recall correctly, I believe Duke Power brought it to our attention about whether I think through an internal audit, if I recall, some of their own internal environmental audits, the question came up: Is this applicable or not? They brought it to our attention. When I performed our inspection, I went and ahead and looked at it closely and we asked for the information acquired to make that determination.

Q. Is that an example of Duke Power having a concern or question about whether NSPS or regulation applied to something they had at their facility or were doing at their facility and they would raise that with you?

MS. BEHLES: Objection to form.

THE WITNESS: It's been my experience not only this inspection but through my dealings with Duke Power, whether there's been a situation that may lead to a notice of violation or whether it's just been issues that need clarification, that they've always been forthcoming with whatever I have asked for.

* * *

[13] Q. It says here, "Bill Kissel of MRODAQ accompanied me on this inspection." Tell us what MRODAQ stands for?

A. Mooresville Regional Office, Division of Air Quality.

Q. Same type of position you held?

A. Yes, sir. He was an engineer.

Q. And he accompanied the EPA people about a month or six weeks earlier when they went to Allen?

A. Yes, sir, he did.

Q. The report is six pages long. Tell us what you concluded at the end about the compliance status?

MS. BEHLES: Objection to form.

THE WITNESS: Okay. When we perform inspections, whether it is a Title 5, Duke Power or any facility that we have a permit on, after we inspect and review records and everything is considered, our bottom statement is, determines whether we feel like based upon what we reviewed and what we inspected at that time it appeared to be in compliance with all the applicable air quality regulations.

* * *

[18] Q. This, in looking at paragraph 3 where it says "Purpose, purpose of inspection/facility, general." "The purpose of this visit was to conduct a routine air quality compliance inspection."

A. Yes, sir.

Q. Is that one of the, like the others, a general inspection that you conduct?

A. Yes, sir. These are our, like it states there, routine air quality compliance inspections that we do periodically.

Q. This looks like Angela Hall from Mooresville accompanied, you on this inspection?

A. Yes, sir, she did.

Q. And you met with Donna Burrel or is it Burrell?

A. I call her Burrel.

Q. I will too. And she's the environmental coordinator at the Allen plant?

A. Yes, sir.

Q. Has she always been forthcoming and open and honest with you?

A. Donna sticks out particularly well because she is very meticulous and they call her the school teacher because she'll correct everyone's paper before they send them out. They'll let her proofread them. Donna is very meticulous and also I'd like to at this point there's a gentleman on here [19] named Lawson Jenkins. And he is also available and we go into quite in depth and of what they're doing with the ESPs and basically giving me a good education every time I go. Learn a little more each time. Jeff Russell, he is typically there so he can answer anything from the CEMS side or anything along those lines.

Q. Does Duke Power always provide the people to answer any questions you have?

A. Yes, sir. Typically the way they do it now is like for instance, Ms. Burrel, we typically do unannounced inspections; but I will give several days notice because if these folks are not there, there is no use for me to go to the plant and didn't feel like there's nothing that can change in that short of amount of time. But she'll organize it with these folks to work it out so they can be there to answer all my questions, because I do get very detailed in some of these issues. And the other plants, they have these folks available, similar positions at the other plants also so that I can ask questions. And when we go to the plants, I'll even go and typically talk to the operators and ask them questions about what they do and so forth, if they have people readily available. And then there are folks from an operator to whoever is working that I'll just – not unusual for me to stop and ask them question, whether it was just for my knowledge, education or whether I feel like it may be [20] compliance related.

Q. Let me show you one more group, Exhibit 912. Are those inspection reports that you prepared and signed for the Riverbend facility of Duke Power company from March 11, 1994 through June 13, 2000?

A. Yes, sir, these appear to be copies of my inspections performed at Riverbend station.

Q. Let me ask you to look at the last one that's dated June 13, 2000.

A. Okay.

Q. This appears to be one of the – under paragraph 3, the routine air quality compliance inspections?

A. Yes, sir.

Q. And Ms. Carlotta Adams from the Monroe office accompanied you on that inspection?

A. Yes, sir, from the Mooresville office.

Q. I mean from the Mooresville office. And you met with Steve Rutledge at Riverbend plant?

A. Yes, sir.

Q. Has he always been cooperative with you?

A. Yes, sir, he has.

Q. And does he appear to be knowledgeable and interested in complying with Clean Air Act regulations?

MS. BEHLES: Objection to form.

THE WITNESS: Based upon my interaction with him [21] and the questions I asked, he's always been forthcoming and appeared to me to be conscientious about not just air quality but these folks are also responsible for the water, waste and other issues. But yes, sir, he did.

Q. Let's look at your conclusion in paragraph 11 and 12. You say, "During this inspection the facility appeared to be in compliance with applicable air quality regulations with the exception of the following." And then this is the first time I have seen it in any of your reports you refer to the EPA saying that the Riverbend facility is in violation but on schedule is –

MS. BEHLES: Objection to form.

THE WITNESS: And –

Q. Let me ask you first. Was it your conclusion separate from what EPA said that the facility appeared to be in compliance with applicable air quality regulations?

MS. BEHLES: Objection to form.

THE WITNESS: Everything appeared to be in compliance with exception to EPA's concern with the PSD issue.

Q. Tell us what EPA had said to you, if anything about their concern about the PSD issue?

A. I have limited interaction. I am not sure I even talked with any of the EPA folks. This came down through our office, that there was a concern about PSD applicability on [22] rework of some of the units and that came down through our folks.

Q. In all your experience in inspecting units at Duke Power, had EPA ever before this time in 2000 said they had any concern about PSD issues at Duke Power plants?

A. Not during my tenure, no, sir.

MR. COTTINGHAM: Thank you, Mr. McManus. That's all the questions I have.

MS. BEHLES: Can we take about a five-minute break?

VIDEOGRAPHER: Off record. Time is 12:10.

VIDEOGRAPHER: On record. Time is 12:16.

EXAMINATION

BY MS. BEHLES:

Q. Mr. McManus, thank you for coming down today. As I mentioned earlier, my name is Deborah Behles. I am here representing the U.S. Department of Justice.

First of all, in reference to something you were just speaking about to Mr. Cottingham, you were talking about NSPS applicability to some kind of tank. What kind of tank was that?

A. If I remember correctly, I think it was about a hundred, 110,000 gallon number 2 fuel oil storage tank which is typically used for light-off say from a cold start where they use number 2 fuel oil until they get it up to a temperature where they can inject the pulverized coal unit.

* * *

[24] Q. During thse inspections that we have the reports that are marked in Exhibits 909 through 912, did you ever have any discussions about PSD?

A. No, ma'am, not that I recall.

Q. Did Duke ever ask about PSD?

A. Not directly to me that I can recall.

Q. Did you ever do a PSD evaluation on any of these inspections?

MR. COTTINGHAM: Object to the form.

A. No, ma'am. No, ma'am. Those determinations are not made in the field. If there would be a red flag to go up, then of course we start gathering the information to make

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that determination back at the office or once we reviewed all the information and talked to all the appropriate people.

Q. Would you ever do emissions calculations for PSD purposes in the field?

A. No, ma'am. In compliance we typically do the compliance inspections. That is usually addressed with our permits folks, and also we received the annual air emissions inventory which provides us with their emissions and that data is readily available on the CEMS also.

* * *

[32] Q. Would you say that ESP performance and opacity determinations are the focus of these routine inspections?

MR. COTTINGHAM: Object to the form.

THE WITNESS: That's a big part of the inspection but that's not the total inspection. Total inspection is to look at all air quality related issues at the plant.

Q. In these inspection reports, when you say "this facility appeared to be in compliance with applicable regulations," do you consider this sentence to be a PSD evaluation?

MR. COTTINGHAM: Object to the form.

THE WITNESS: When I write that statement, that is everything to my knowledge that I can think of that would be applicable to that facility. If I thought PSD was an issue, then that would be raised. Like I stated before, if I overlook something, then typically supervisor or other folks that's reviewing these would call that to my attention. But

when I write that statement, based upon my file review, on site inspection and all post inspection work, I only write that statement if I truly feel that this facility is in compliance with all regulations.

Q. Have you ever done a PSD evaluation during an inspection?

A. No, ma'am, I have not.

* * *

EXHIBIT 146

KEY REGULATIONS AND ISSUES IMPACTING
ALTERNATE FUELS, FUEL ADDITIVES,
AND FACILITY MODIFICATIONS
WTH 2/13/95

PREVENTION OF SIGNIFICANT DETERIORATION (PSD).

The federal PSD regulations were designed to prevent additional deterioration of air quality in geographical areas near major emissions sources beyond state-established emission baselines. If a proposed Duke project triggers PSD requirements, the cost of the project would increase substantially for best available emissions control technologies (e. g. scrubbers, baghouses, upgrades ESPs etc.) on the emission source/unit in question.

Exemptions from "major modification" definition:

1) Routine repair, maintenance, and replacement.

2) An alternate fuel or raw material generated from municipal solid waste.

3) An alternate fuel or raw material the source was capable of accomodating before 1/6/75, unless prohibited under a federally enforceable permit condition after 1/6/75.

4) A change in ownership.

5) WEPCO: A pollution control project that is overall "environmentally beneficial" electric utility project, providing . . .

a) no significant net increase in representative, actual, annual emissions of a criteria pollutant (SO2, NOx, particulate, VOC/O3, CO, Fl, Pb, Be, Hg, sulfuric acid mist, plus HCl and chlorinated dioxins and dibenzofurans from municipal waste combustors). Note: The

State/EPA will consider the representative actual annual emissions following the modification to be the average rate in tons/yr of any 2-yr period w/i a 10-yr window following the change, taking into consideration the effect of the change on the hourly emissions rate and on capacity utilization. Any increased capacity utilization unrelated to the change or related to growth and increased electric demand will not be considered in the average rate calculation.

b) will not contribute to national ambient air quality standard violation, visibility impairment, or consume PSD increment.

Source Exemptions:

6) Emissions increases leading to air quality impacts less than de miinimis amounts for CO, NO2, TSP, PM-10, SO2, O3/VOC, Pb, Hg, Be, and Fl, using current EPA-approved dispersion models.

Key Definitions:

Municipal Waste Incinerators/Combustors, as defined in the PSD regulations, are capable of burning >250 tons of refuse/day. Other definitions in the the municipal waste regulations may also apply.

NEW SOURCE PERFORMANCE STANDARDS (NSPS).

The federal NSPS regulations were designed to ensure that new facilities meet more stringent air emissions rate standards and to ensure that existing sources adhere to the same stringent new source standards when they undergo an applicable modification (a physical change or change in method of operation that would increase the

ton/hr emission rate of a pollutant to which a standard applies. If a proposed Duke facility modification triggers NSPS for the major generating units, the cost of the project would be substantially increased to achieve more strignent NSPS emissions rates and for additional monitoring and reporting requirements to document compliance under the new requirements.

The ton/hr emission rate following the change would be compared with ton/hr emission rate 5 years prior to the change (e. g. the modification must not be for the purpose of regaining capacity which has not been maintained over time).

Exemptions from Applicable Modification:

1) Routine maintenance, repair, and replacement. Replacement of entire systems (including aux. and other small boilers even if the replacement is smaller than the the original equipment) is a "reconstruction" and falls under the 50% rule below.

2) An increase in the production rate w/o a capital expenditure.

3) An increase in the hours of operation (note: PSD regs disallow an increase in hr of operation not attributed to increased electric demand.)

4) Use of an alternate fuel or raw material IF the facility was originally designed to accomodate the material (e. g. if the material's use could accomplished under the facility's construction.)

5) Addition or use of a system or device whose primary function is to reduce air pollutants (overall environmental beneficial determination determined at the discretion of EPA).

6) Change in ownership.

Reconstruction. In addition to any consideration of hourly emission rate, any replacement of components of an existing facility that results in a fixed capital cost of the components in excess of 50% of the capital cost to construct a comparablel entirely new facility would trigger NSPS.

MODELING/TALL STACKS ISSUES.

State Toxics

NC and SC air toxics regulations prevent increases in emissions of some 200 listed inorganic and organic toxins from air emissions sources. Facility modifications including use of alternate fuels and fuel additives that increase emissions of any state-listed toxins will require a toxics evaluation. The evaluation may involve

1) an analytical demonstration that the change will offset coal combustion and result in a "net decrease or no increase in each state-listed toxin.

2) Net increases in a particular toxin will require a model demonstration that the health based allowable abmient limit (AAL) can be met at the property line.

Note: Combustion of materials that are higher in arsenic than coal should be avoided at all facilities but Belews Creek and Cliffside 5, due to short stacks and inadequate poor dispersion. Otherwise, the facility could be subjected to toxics controls or erection of taller stacks.

Sulfur Dioxide

NC and SC regulations have required a modeling demonstration of compliance with the national ambient air quality standards (NAAQS) for SO_2. Due to the short stacks at all facilities but Belews Creek, modeling of SO_2 remains an unresolved issue. We are currently demonstrating compliance for all facilities via monitoring at Marshall and Riverbend.

Note: Any modifications (including alternate fuels or additives) that increase sulfur dioxide emissions, would raise the SO_2 dispersion modeling issue, triggering a requirement to build taller stacks, load reductions, or a lower SO_2 emissions rate. Also, modifications that negatively impact SO2 dispersion, (eg. decreased exit gas temperature, or decreased velocity) would raise the SO_2 modeling issue for coal-fired facilities other than Belews Creek.

EXHIBIT 147

Environmental Permits/
Regulatory Review Training

Grady Allen, Bill Horton

ESS Environmental Division

[Training conducted to Fossil/PG mgt. & staff on several ocassions during 1994/1995.]

Avoiding PSD

- No net increases in ton/yr (or ton/hr) emission rate

  – SO2, NOx, PM-10, VOC, CO

  – Fl, Pb, Be, Hg, sulfuric acid mist, HCL, [partially illegible – probable "vinyl"] chloride, chlorinated dioxins, dibenzofurans

- No increased capacity utilization, except for increased power demand

- Representative, actual emissions = 2-yr period w/i 10 yr period following change

* * *

EXHIBIT 148

From: RAM2026 – PRDC Date and time 05/23/97 16:56:42
To: JEE7230 – PRDC
DWS5151 – PRDC
WTH7130 – PRDC
WJM8364 – PRDC Bill McCabe
MJB7220 – PRDC
JJB7235 – PRDC Joe Barna
GDT7206 – PRDC
KWK7265 – PRDC Kris Knudsen

Bobby McMurry, MG03C1, 875-5931
Environmental Engineer
Environmental Engineering, Generation Services
Subject: MSS 3&4 mill replacement and PSD/NSPS mtg 5/20/97

A meeting was held to discuss potential PSD/NSPS issues regarding the MSS3&4 mill replacement. MSS is planning on replacing one mill with a larger mill on Units 3&4 to allow the use of lower quality coal or harder grind coal without derating the unit. When the coal contract was changed in 1995 MSS started receiving some coal that was harder to grind and the existing mills could not feed enough coal to the boiler to meet full load for parts of the year. The purpose of the replacement mills is NOT to increase the maximum generation of the units but to regain load lost due to harder grind coal.

To assure PSD is not an issue a review of 2 representative years of the past 5 years was performed to assure the PSD De Minimus would not be exceeded if the larger mills were available prior to the new coal contract. Using GADS information Units 3&4 was derated due to wet or poor coal 4917 MWhr in 1993 and 920 MWhrs in 1994. If larger mills were available and these derates did not occur an

additional 14 tons of NOx and 33 tons of S02 in 93 and 2 tons of NOx and 5 tons of SO2 in 94 have been emitted which is below the 40 tons/yr PSD De Minimus for each of these pollutants. This demonstrates that the new mills should net trigger PSD.

The next issue is to assure the new mills will not increase. the max hourly generation for NSPS. Marshall historically has been able to achieve approximately 700MWs with the proper coal. The new mills would not allow these units to operate at a greater capacity because of other limiting factors such as feedwater. In other words the new mills would only allow the units to meet unit load with a wider variety of coals.

The mill replacements are scheduled for 1999 and 2000 for units 3. and 4 respectively. Using a 1 year lead time for the equipment, permitting would need to start in early 1998. We would probably need to approach the state in Sept 97 to assure there are no road blocks we are not aware of.

There are some environmental benefits such as some lower sulfur coal is of a harder grind (Belews Coal), lower NOx at a lower loads (BOOS), and potentially lower LOI. We will quantify this but may not use because the mills should be justified independent of the environmental benefits. However, if additional NOx reduction is required (very high likelyhood)additional mill replacements would be required to achieve BOOS at full load which is just part of the Low NOx Burner.

To prep for the September meeting the following action items are needed.

1. Documentation that the mills are not the limiting factor above 700 MWs. Equipment specifications and actual data. Dave Styer

2. Coal information that lower sulfur coal is sometimes harder grind. Bobby McMurry

3. Evaluation of the best option for lower NOx in the .35 to .38 range. Additional mills for BOOS LOFFERS or SOFA without mills. Joe Barna

4. Set up meeting in September with the state. Bill Horton

5. Additional analysis of 93 and 94 MW data to assure representative years.

6. Existing mill specs and replacement mill specs Joe Barna or Dave Styer

If we could get the information by June this would allow us to get it in order prior to September.

Bobby

EXHIBIT 149

* *

MSG FROM: KWK 7265 – PRDC TO: JEP7206 – PRDC 11/02/90 16:29:52
To: JEP7206 – PRDC

From: Kris Knudsen
Fossil Environmental Compliance
Air Quality Group – PROFS KWK7265

Subject: Aux. Boiler Air Requirements

Based on the info you gave me, I've looked further into the permitting requirements for new aux. boilers at Belews.

Info provided: Oil guns: two @ 170 million btu/hr each (Question: Is this one gun per boiler (two total) or two guns per boiler?)

Stacks: 104 feet or less. Present stack: 120 feet.

REGULATORY REVIEW

NSPS
New Source Performance Standards for industrial boilers apply to all boilers with greater than 100 mBtu/hr heat input. NSPS set standards for particulate, SO2, NOx, and monitoring requirements. These are summarized as follows:

Particulate: Emissions must be below 0.10 lb/mBtu, demonstrated by a stack test after initial operation. Subsequent tests not necessarily required, unless the State makes this a permit condition or requests a special test.

Opacity: Must be below 20%, except startup, shutdown, and malfunction. There does not appear to be an exemption

from monitoring, but we MAY be able to argue this based on very low capacity factor.

Sulfur Dioxide: Basically no standard will apply as long as we use a "very low sulfur oil" (less than 0.3 lb/mBtu) or our capacity factor is limited by permit to less than 30%. Number 2 fuel oil would apparently qualify. No monitoring is required if exempt based on the above, but it's possible that we may be required to sample and analyze the fuel oil.

Nitrogen Oxides: Must be below 0.1 lb/mBtu for low heat release burners or 0.2 lb/mBtu for high heat release burners. The transition point is a burner with a heat release of 70,000 Btu/hr-ft3. NOx monitors ARE REQUIRED unless the capacity factor will be below 10%, in which case the operator can submit to the agency a plan to monitor operating conditions to assure that NOx is maintained below the limit. NOx limits should be specified as part of the vendor's requirement, including a plan which we can submit to the state to show how the limit will be met. Apparently this is within the capability of current oil-fired boiler design, but less us know if this a problem.

PSD REQUIREMENTS

PSD review is required for a source which is listed as a "major source" or which has the potential to emit more than 250 tons per year of a pollutant. One "major source" category is a combination of fossil boilers with greater than 250million BTU per hour, so the two boilers would qualify. However, we may be able to show that these are replacement boilers (a "major modification") and that there will be no net increase in emissions, in which case PSD will not apply. This will also depend on the projected use of the new boilers versus the old boilers.

Presuming PSD does apply (we'll try to argue against, but may not succeed), a PSD permit must be issued before beginning construction. This requires 1) ambient air modeling to show protection of air standards and allowable increments for deterioration of air quality; and 2) review of the proposed control technology. Tighter controls could be required, but are not likely for this type of boiler or expected utilization.

More significant is air quality modeling and the time to get a permit. The proposed stack height could very well show problems with modeling especially considering the height of surrounding structures. The model will also have to consider emissions from the two generating units and any other sources in the area. Approval of a modeling plan and time to complete the model could require several months, with a total time to permit taking up to a year. Any problems (i.e. stack height) will also have to be resolved. I will ask Design to look more closely at a rough estimate of whether we could expect problems with the model.

Please advise as to the next step in your process. If you will be proceeding, it will be important to get the permitting people in Design involved as soon as possible since they currently have a number of new facility projects underway. I certainly believe there is nothing in the way to stop this project, but we will require a good bit of lead time.

cc: BKS7265 – PRDC Keith Sipe
DAM7265 – PRDC Dan Markley

Thanks,

Kris Knudsen
373-5104

* *

MSG FROM: TO: 11/06/90 11:26:49
JJB7235 – PRDC JEP7206 – PRDC
To: BOB7235 – PRDC

*** Reply to note of 11/06/90 08:55

Subject: Aux. Boiler
The station has received information from B&W that a drum assessment would require inspection of all longitudinal and girth welds, 5% tube penetration inspection, and inspection of all other penetrations. Due to the welding of tubes to the drum the station would like to increase the tube penetration inspection to 10% or 100 tube connections. The other inspections are felt to be unwarrented due to the temperature and pressure under which the boilers have been operated. This work is rougly scheduled for the end of next week as long as #2 can get on line this weekend.

cc: JEP7206 – PRDC DAN7235 – PRDC

* *

MSG FROM: TO: 11/06/90 14:36:38
BOB7235 – PRDC JEP7206 – PRDC
To: JEP7206 – PRDC

Subject: Aux. Boiler

This is what Joe Barna said about the aux. boiler when I asked about a contact from B&W. The note does not say anything about UT or MT as to what kind of test to do. If you do not find out anything different we will plan to do a MT on the areas defined. What kind of push is this when you get ready for QA. Is it rush enugh for weekend work or if we don't start on thursday would it be better to wait to monday or tuesday of next week so the test can be two

consective days. Sorry for so many questions just trying to get a better handle on what to tell QA.

Thanks
*** Forwarding note from JJB7235 – PRDC 11/06/90 11:26 ***
TO: BOB7235 – PRDC

*** Reply to note of 11/06/90 08:55
Subject: Aux. Boiler
The station has received information from B&W that a drum assessment would require inspection of all longitudinal and girth welds, 5% tube penetration inspection, and inspection of all other penetrations. Due to the welding of tubes to the drum the station would like to increase the tube penetration inspection to 10% or 100 tube connections. The other inspections are felt to be unwarrented due to the temperature and pressure under which the boilers have been operated. This work is rougly scheduled for the end of next week as long as #2 can get on line this weekend.

CC: JEP7206 – PRDC DAN7235 – PRDC

****

MSG FROM: TO: 11/19/90 15:31:32
BOB7235 – PRDC JEP7206 – PRDC
To: JEP7206 – PRDC

*** Reply to note of 11/19/90 15:16
Subject: Aux Boiler Drum Assessment
I will give you a outline of the stress relief, repairs and tube welding when I have figured it out. Can you give me a deadlinedate? I know you are trying to do the work next year. I am trying to get some information from Joe Barna or Bill Turner on the tubes we have been welding at

Riverbendbut I have found out that they are in a different situation

Thanks

* *

MSG FROM: KWK7265 – PRDC TO: JEP7206 – PRDC 11/28/90 14:04:51
To: JEP7206 – PRDC James E. Plybon
ICB7230 – PRDC James C. Burnette

From: Kris Knudsen
Fossil Environmental Compliance
Air Quality Group – PROFS KWK7265

Subject: Aux. Boilers

Any further word on where to proceed with new aux. boilers? Let us know if we can help.

Also, this review brings up the issue of an air quality permit for the existing boilers. We were under the impression that the boilers were less than 100 million Btu/hr heat input, which would exempt them from having a permit. For a boiler over 100mBtu/hr, a permits is required unless the DEM specifically grants a request for exemption. To our knowledge, we have not asked for this exemption. We will investigate further to verify whether there has been any correspondence with the State. Please advise if you are aware of any information.

Because of the size of these boilers, also be aware that any major modification is subject to review for NSPS/PSD applicability. The primary consideration should be whether the work will allow any greater utilization (more emissions), but regulations will also apply if the cost of repairs is more than 50% the cost of a replacement boiler.

cc: AMW7206 – PRDC GDT 7206 – PRDC
BKS7265 – PRDC Keith Sipe

Thanks,

Kris Knudsen
373-5104

* *

MSG FROM: TO: 11/28/90 13:16:26
GTB7230 – PRDC JEP7206 – PRDC
To: JEP7206 – PRDC Jim Plybon

Glenn Burney
Belews Creek – Operations
429-0501
Subject: Auxiliary Boilers
Glenn
*** Forwarding note from EFG7230 – PRDC 11/27/90 15:16 ***
To: GTB7230 – PRDC

FROM: EVERETT GREENSTREET
BCSS
NATION'S BEST

Subject: Auxiliary Boilers
EV
429-0500
*** Forwarding note from HWS7206 – PRDC 11/27/90 15:12 ***
To: EFG7230 – PRDC MWC7290 – PRDC
DEW7220 – PRDC HCJ7260 – PRDC
HMF7250 – PRDC WFH7200 – PRDC
MLB2468 – PRDC RLD7210 – PRDC

From: HWS7206 Howard W. Shea
FOSSIL OPERATIONS WC-1665
Phone 373-2323
Subject: Auxiliary Boilers

FPD GO Environmental is reviewing possible permitting requirements for existing Auxiliary Boilers and have requested the following information:

– Max. Heat Input, million BTU per hour
– Type of fuel
– What are uses of boilers
– Expected utilization, hours per year

I have the following from 3 years ago when we provided some of the information:

STATION	HEAT INPUT< Million BTU per HR	FUEL
BC	2 blrs at 96 each	#2 oil
BK	1 blr at 21	"
CS1-4	1 blr at 6	"
CS5	1 blr at 75	"
DR	1 blr at 15	"
LS	1 blr at 8	"
MS	1 blr at 172	"
RB	1 blr at 2	"
PROPOSED		
LS	3 blrs at 15 each	No 2 oil or gas
AS	1 blr at 33No. 2 oil	
or		
1 blr at 43	No. 2 oil	

Please review the information for accuracy and in Lee's and Allen's cases give me the information on the boilers you installed.

Also for all stations will need the hours per year use and use for the boilers(plant, deaeration of DI make up, unit start, etc).

Please try to provide by Dec. 15, 1990 to H. Shea.

Thanks,

Howard

cc: AMW7206 – PRDC KWK7265 – PRDC

****

MSG FROM: TO: 11/28/90 13:19:16
GTB7230 – PRDC JEP7206 – PRDC
To: JEP7206 – PRDC Jim Plybon

Glenn Burney
Belews Creek – Operations
429-0501
Subject: Aux. Boiler
From the sound of this note I think it is important to figure out as soon as possible what CMD sees as there part in this project. I believe we will be hard pressed to have this project completed by July.
Glenn
*** Forwarding note from OWS7207 –PRDC 11/27/90 16:19 ***
To: GTB7230 – PRDC Glenn T. Burney

FROM: O.W. (Walt) Sealy
WC-1531
Subject: Aux. Boiler
Glenn, I talked with Everett today about the subject project. CMD indicated they would have resources available from Jan. '90 through July '90 to do the project. Everett indicated there was not sufficient damage to the drum to warrent replacement so we would probably repair rather than replace the aux. boilers. In order to get the funds approved, I need and estimate of both materials and installation. Jim Plybon and Joe Barna have been working on this project. CMD will be able to support at other times but the time frame indicated is preferable.

cc: RTB7202 – PRDC

Thanks, Walt
373-7058

* *

MSG FROM: TO: 11/28/90 16:12:12
JEP7206 – PRDC HWS7206 – PRDC
To: HWS7206 – PRDC Howard Shea – Foss

From: Jim Plybon
BELEWS CREEK STEAM STATION
Phone # 429-0507
Subject: Auxiliary Boilers

Howard:

How are things going down there? Good I hope.

The following is information you requested on the BC Aux boilers.

Max heat input is 170 million BTU/Hr per boiler
Fuel is #2 fuel oil
The boilers are used for unit startup.
The expected utilization of these boilers is approx. 62 hours per year.
(This includes test firing once per week and a cold unit startup once every two years.)

EXHIBIT 151

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

Civil Action No. 1:00 CV 1262

UNITED STATES OF AMERICA,

Plaintiff,

ENVIRONMENTAL DEFENSE
NORTH CAROLINA SIERRA CLUB,
NORTH CAROLINA PUBLIC
INTEREST RESEARCH GROUP,

Plaintiff-Intervenors,

vs.

DUKE ENERGY CORPORATION,

Defendant.

_____/

DEPOSITION OF WILLIAM T. HORTON
(Taken by Plaintiff)
Charlotte, North Carolina December 4, 2002

* * *

[104] Q. How many times did you contact the State?

A. I would estimate four or five.

Q. Did you tell the State during any of those contacts about the other work that was being done to the unit during that outage?

A. I did not.

Q. Did you know the specifics of the work that was being done during that outage?

A. I think I was generally aware of the kinds of activities that were being planned, participated in some early meetings as part of a team, did not see those meetings through to conclusion and do recall – do recall – I'm trying to remember. I think I've answered the question though.

* * *

[105] Q. So did you notify the State or put the State on notice on any occasion of the work that was being done at the boilers that we've alleged in our complaint?

MR. SOMERS: Object to the form.

THE WITNESS: I personally did not and where I had general knowledge wouldn't have [106] thought it necessary because they were deemed to be routine maintenance.

BY MS. BEHLES:

Q. So you would have deemed it unnecessary to put the State on notice because you thought that you didn't need a permit, is that a fair statement to make?

A. Routine maintenance does not require a permit.

Q. Okay.

(Thereupon, Plaintiff's Exhibit Number 653 was marked for Identification.)

BY MS. BEHLES:

Q. Okay. Mr. Horton, I've now handed you what's been marked as Exhibit 653, it's a letter from, I believe, you dated February 16, 2001. You want to just take your time to look it over and let me know when you're ready.

A. Okay. I recall this.

Q. Okay. First of all, did you write this letter?

A. I did.

Q. Okay. Who is this letter being written to?

A. It is being written to the regional permitting contact in Winston-Salem office.

* * *

EXHIBIT 152

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CIVIL ACTION NO. 1:00 CV 1262
UNITED STATES v. DUKE ENERGY CORPORATION

EXPERT TESTIMONY REPORT OF RANAJIT (RON) SAHU

/s/ Ranajit Sahu

ON BEHALF OF THE

UNITED STATES

AUGUST 1, 2002

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A. RESUME FOR RANAJIT SAHU .....

B. LIST OF PUBLICATIONS AND PRESENTATIONS.....

C. STATEMENT OF COMPENSATION ..

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E. AP-42 COAL COMBUSTION EMISSION FACTORS .....

F. SUMMARY RESULTS OF PSD EMISSIONS CALCULATIONS.....

G. DETAILED RESULTS OF EMISSIONS CALCULATIONS.....

H. DOCUMENTS CONSIDERED.....

Information Required by Federal Rules of Civil Procedure

The following is a listing of the items provided as required by the federal rules of procedure:

1. This report contains my opinions, conclusions and the reasons therefor; and,

2. Attachment H lists the data or other information I used in forming my opinions; and,

3. A statement of my qualifications is contained in Attachment A; and,

4. A list of publications I have authored within the last ten years is shown in Attachment B; and,

5. My compensation for the preparation of this report and my testimony is included in Attachment C, and,

6. A statement of my previous testimony within the preceding four years as an expert at trial or by deposition is contained in Attachment D.

This report contains calculations and conclusions based on data and information in my possession at the time of submittal of the report. In some cases data requested from Duke Energy Corporation was still pending and had not been received prior to submittal of the report. Should additional data or other documentation become available I reserve the right to appropriately revise my analysis, calculations, and conclusions and to supplement the contents of this report.

I. BACKGROUND AND EXPERIENCE

I. Ranajit Sahu, have over fifteen years of consulting and teaching experience in the fields of mechanical, environmental, and chemical engineering including, design and specification of equipment, air pollutant emissions calculations and analysis (specifically from coal combustion), air pollution control and equipment design, combustion engineering (specifically including coal combustion), process engineering, energy studies, transportation air quality impact analysis, dispersion modeling,

health risk assessments, regulatory strategy developmen and design for pollution prevention. I have over ten yeai of project management experience and have successfull executed over 300 projects in this time period. This ir cludes basic and applied research, design, regulator compliance, permitting, energy, risk, and public interfac projects. I have provided comprehensive multimedi compliance assistance encompassing all media – ai water. solid and hazardous waste, mixed waste, noise, an community issues – to numerous industrial, government and commercial clients during the last decade. My client have included major petroleum refineries, steel plants cement companies, power generation facilities, and th government sector. To date, I have performed projects i over 40 states (including in North and South Carolina · working on Title V and other permitting matters) in th United States, numerous local jurisdictions and interna tionally.

I have a B.S., M.S., and Ph.D., in Mechanical Engi neering, the first from the Indian Institute of Technolog (Kharagpur, India) and the latter two from the Californi Institute of Technology (Caltech) in Pasadena, California My research specialization was in the combustion of coa and, among other things, understanding air pollutio aspects of coal combustion in power plants.

Some of the clients I have assisted on a variety of ai pollution permitting and other regulatory matters in clude San Diego Gas and Electric, Shell Oil Company British Petroleum, Chevron, Mobil, Honeywell, Northrup Grumman, Holnam Cement, Southdown Cement, Oregor Steel Mills, and Birmingham Steel Mills.

In addition to consulting, I am also active in teaching. Over the past 9 years I have taught, and continue to teach, a number of courses (e.g., Introduction to Air Pollution, Atmospheric Chemistry and Physics. Risk Analysis and Management, Process Safety Management, Air Toxics and Risk Analysis, Transportation and Air Quality, etc.) in several Southern California universities including UCLA, UC Riverside, Loyola Marymount University and Cal State Fullerton. In addition, I have also taught air quality and engineering courses at my alma mater Caltech (Heat Transfer) and at the University of Southern California (Air Pollution). I have also provided training in air pollution and energy regulatory issues to Southern California Gas Company and at the Institute of Gas Technology, Chicago.

Additional details regarding my background and experience can be found in my resume provided in Attachment A and in the list of publications and presentations provided in Attachment B. Attachments C and D contain a statement of compensation and my previous expert witness experience, respectively.

II. SUMMARY OF TESTIMONY REPORT

For this proceeding, I have been requested by the United States Department of Justice (DOJ) to provide a report that addresses the following items:

1. the process by which certain air pollutants (specifically, nitrogen oxides (NO_x), sulfur dioxide (SO_2), and

particulate matter (PM[1])) are generated and emitted by utility coal fired power plants;

2. the general methods of estimating and measuring such emissions to the atmosphere;

3. a major regulatory program under the Clean Air Act (and its Amendments) that can apply to certain coal-fired power plants: the New Source Review (NSR)/ Prevention of Significant Deterioration (PSD) program;[2]

4. a description of the status of the PSD program pursuant to the State of North Carolina State Implementation Plan (SIP) and the State of South Carolina SIP and how this would have applied to the various modifications;

5. the methods used in, and results derived from, specific emissions estimates of SO_2, NO_x, and PM from all of the units operated by the Duke Energy Corporation (Duke) in connection with this proceeding. Specifically, I developed estimates of the quantity of pollutants emitted (or anticipated to be emitted) by each generating unit in this proceeding during specific periods both prior and subsequent to each of the component replacement projects

---

[1] Although particulate matter (PM) is generated during coal-fired combustion, in the present instance all Units in connection with the current proceeding have electrostatic precipitators (ESP) to control PM emissions. It is anticipated that a significant portion of the PM emitted into the atmosphere (roughly 67%) would be smaller than 10 microns in aerodynamic diameter – i.e., PM_{10} (see AP-42 Table 1.1-6). In this report, since Duke's PM source testing data are used for calculating and developing PM emissions estimates, PM refers to total particulate such as that obtained from EPA Method 5 testing. PM_{10} is later calculated from the PM estimate by using this fraction, i.e., 0.67. In the text PM also refers to PM_{10}.

[2] 40 CFR 51.

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described in the United States' Amended Complaint.[3] These emissions estimates are based on data and information that was available to Duke prior to each such component replacement, as well as other public information from public data sources. The emission estimates are based on approaches that could reasonably have been used by Duke in making judgments regarding the applicability of the federal NSR/PSD program and, as relevant, the applicability of the North Carolina and South Carolina SIPs to the respective component replacement projects;

6. for each component replacement project, the comparisons of the unit's emissions both prior and subsequent to the project, using several different comparison tests. Although the regulations do not require a source to conduct each and every one of the comparisons I have performed in every instance, to determine whether a project will result in an emissions increase as defined by the regulations, I have conducted an array of retrospective comparisons based on data that would have been available to Duke and using methods that also would have been available to Duke to aid the Court's evaluation of regulatory determinations. For those calculations aimed at projecting the effect of the modification on emissions of the unit, I relied on both Duke's own internal estimates of the likely effect of the modification on generation (and consequent emissions), and on information derived from the Generating Availability Data System (GADS)[4] and from other system planning modeling projections[5] regarding

[3] United States of America v. Duke Energy Corporation, Complaint.

[4] Generating Availability Data System. Data Reporting Instructions, October 1999.

[5] This projections used modeling tools such as PROMOD or similar programs. Details pertaining to this are provided in the expert report of Mr. Bruce Biewaid.

unit performance as reported by Duke. GADS loss data directly provide "activity factors" for emissions calculations such as losses in unit generation availability due to specific causes. This data, once appropriately adjusted for unit utilization due to demand and dispatch, can identify causal relationships between outages or deratings and specific component failures or malfunctions. Thus, adjusted GADS generation loss data, converted appropriately to emissions, was used to determine the emissions increases that could have been projected as a result of specific component replacements. As noted above, GADS data was used because it was readily available to Duke at the time of each modification. Similarly, the projections of future unit capacity made by PROMOD or similar programs by Duke prior to each modification directly show the anticipated manner in which particular units were likely to be operated by Duke in the future.

III. HOW EMISSIONS ARE FORMED DURING THE PRODUCTION OF ELECTRICITY FROM COAL

The primary purpose of burning coal[6] in a boiler is to generate heat by reacting the coal with oxygen present in air. The most significant reactive constituents of coal are

[6] In addition to coal, a "coal-fired" power plant boiler can also use small quantities of other fuels such as various fuel oils (such as diesel) or natural gas at startup. Similarly, other supplemental fuels or fuel sources such as used tires may also be used to generate heat in the boiler. In fact, at times, similar materials as well as others have been used at the various Duke units – however, the resulting heat releases from such fuels is generally so small in relation to that from coal that their effects were not directly considered in the overall analysis presented in this testimony. Any adjustments to account for the use of such startup and supplemental fuels are not anticipated to change the conclusions of the analysis.

carbon, hydrogen, nitrogen, and sulfur.[7] Coal also contains ash which does not play a role in heat release, Carbon (C) and hydrogen (H_2) are significant because they are the primary sources of the heat released. Carbon is by far the largest component of coal, often comprising 80% or more of the total mass of many coals.[8] Nitrogen (N_2), sulfur (S), and ash are significant because they are released in various forms as compounds relevant to air pollution. In addition to being present in combustion air, nitrogen may also be contained in the coal itself.[9]

The extent to which these elements are present in the coal burned depends on the source and type of the coal. Coal is mined in many different parts of the United States and is usually classified according to heat content, sulfur content, ash content and moisture content.[10] Other characteristics such as hardness and grindability are of interest for the purpose of fuel preparation considerations.

Heat content is measured in units of British Thermal Units (BTU) per pound of coal. A BTU is the amount of energy required to raise one pound of water one degree Fahrenheit. The heat content, (which is directly related to the carbon and hydrogen contents), as well as the nitrogen, sulfur and ash contents may vary according to the source of the coal burned at a particular power plant. The sulfur, ash, and moisture contents can vary depending on the source of the coal, its ultimate origins and its age.

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[7] Steam – Its Generation and Use. Babcock and Wilcox, 40th Ed., 1992, Ch. 8.

[8] Ibid.

[9] Ibid.

[10] Ibid.

During the combustion/oxidation process, the elements contained in the coal – including C, H_2, N_2, and S – react with O_2 (i.e. oxidize) to form new compounds. Most of the carbon contained in the coal is thus transformed to carbon dioxide (CO_2) along with some amounts of carbon monoxide (CO). The hydrogen is generally transformed to its oxide, namely water vapor (H_2O). Nitrogen and oxygen combine in the boiler to form various oxides of nitrogen including NO, NO_2, and small quantities of N_2O. The first two of these pollutant oxides of nitrogen formed by combustion are often referred to as a class of compounds known as NO_x. NO_x is formed not only by the N_2 in the coal (fuel NO_x), but is also formed by the reaction of the N and O_2 found in the air used for combustion (thermal NO_x). Oxygen reacts with S to form several compounds, including the air pollutants sulfur dioxide (SO_2) and sulfur trioxide (SO_3). The ash in coal is comprised of metals and metal oxides. Many of the metals that exist in the coal in elemental form also react with O_2 to form additional metal oxides. Some of the ash in the coal drops to the bottom of the boiler. This ash is referred to as bottom ash. The remaining ash, referred to as fly ash or particulate matter (PM), is carried out of the boiler along with the other gaseous products of combustion, including those described above. This mixture of combustion products is known as flue gas. Flue gas, therefore, contains CO_2, H_2O (vapor), CO, SO_2, NO_x, various amounts of particulate matter, and numerous other compounds in smaller amounts.

In summary, most of the pollutants that are present in the flue gas are either initially present in the coal matrix (such as ash) or, are chemically formed in a complex series of reactions during the processes of oxidation of various coal constituents with combustion air. The pollutants of

interest in this proceeding are NO_x, SO_2, and PM. The rate of formation and release to the atmosphere of these pollutants is primarily a function of:

(a) the type of coal (depicted by the heat content and the contents of nitrogen, ash, sulfur, and moisture in the coal);

(b) the rate at which the coal is introduced, or fed, into the boiler;

(c) the physical form in which the coal is fed into the boiler;

(d) the types of burners used in the boiler;

(e) the amounts of air used for combustion;

(f) the manner in which the air is introduced; and

(g) the presence of air pollution control devices designed to minimize the formation of, or enhance the destruction or capture of; these pollutants.

Of these various factors, the amount of coal fed per unit of time (usually tracked in units if tons/hour, millions of pounds/month, or thousands of tons/month, etc.) is a significant factor. This parameter directly relates to the size of a unit. Typically, assuming similar design, operation practices and pollution controls, the higher the nitrogen, sulfur and ash contents of the coal, and the higher the coal feed rate, the higher the amount or quantity of the pollutants NO_x, SO_2, and PM that are emitted from power plant boilers into the atmosphere.

Of course the primary purpose of burning coal in a boiler is to liberate the chemical energy contained in it to

generate heat. This heat is then transferred to a working medium (typically water, which upon being heated becomes steam), and, in turn, the steam is used to create mechanical work (or, more accurately mechanical power) in a turbine. Finally this mechanical power is converted to electrical energy (megawatts) in a generator. Thus, for a specified type of coal and boiler design, higher coal feed rates generally imply higher electricity, generation rates. Since higher coal feed rates imply higher emissions of pollutants per the discussion earlier, it follows that, higher electricity generation rates generally result in higher emissions rates of pollutants to the atmosphere.

IV. CAA AND RELEVANT STATE REGULATORY PROGRAMS

The Clean Air Act (CAA), and the regulations promulgated to enforce its provisions have been modified several times over the years since 1970. These modifications have added several air pollution prevention and control provisions designed to protect and enhance the quality of our Nation's air resources. This section will discuss one of the major regulatory programs that forms the cornerstone of the regulatory air pollution prevention and control strategy which strikes a balance between economic growth on the one hand and attainment/maintenance of health-based ambient air quality standards on the other hand. These National Ambient Air Quality Standards (NAAQS) are goals that are supposed to be attained or met throughout the nation. The NAAQS establish health-based levels of certain "criteria air pollutants" applicable to all persons in all areas of the country. The pollutants of interest in the

present proceedings (NO_x, SO_2, and PM) are criteria pollutants.[11]

The major regulatory program that will be discussed below, namely the New Source Review (NSR) program [40 CFR 52], generally takes a predictive, annual, facility-wide view of the impacts of facility emissions for specific listed pollutants on the ambient air. If applicable, the NSR program requires sources to put on the best possible controls[12] that are technically feasible and economic (only BACT requires a consideration of economic factors) and to demonstrate, via mathematical or computer-based modeling, that estimated or projected post-control emissions from plants are not in conflict with ambient air quality goals.

IV.1 NSR/PSD Regulations

The basic requirements of the New Source Review (NSR) program are established in parts C and D of Title I of the Clean Air Act. The purpose of the program is to protect, among other things, public health and welfare, even as new sources are built and existing sources expand to meet economic growth considerations. Specifically, its purpose is to ensure that:

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[11] United States of America v. Duke Energy Corporation, Complaint.

[12] These controls or corresponding emissions levels are either called Best Available Control Technology or BACT (to be applied to sources in areas where the NAAQS are already being attained) or Lowest Achievable Emission Rate or LAER (to be applied to sources in areas where the NAAQS are not presently being attained or non-attainment areas).

(a) air quality does not worsen where the air is currently unhealthy to breathe – i.e., in non-attainment areas; and

(b) air quality is not significantly degraded where the air is currently clean – i.e., where current standards are attained or attainment areas.

The fundamental philosophy underlying NSR since its inception is that a major source should install modem pollution control equipment when it is built (for new sources) or when it makes a major modification that increases emissions significantly (for existing sources). Congress believed incorporating pollution controls into the design and construction when new units are built or when old ones are modified significantly is generally the most efficient way of controlling pollution from major sources.

NSR requires a major source to obtain a permit and undertake other obligations *prior to* construction to control its emissions of air pollution. For new sources or for sources that have not begun normal operation (i.e., such as after a non-routine physical change or a change in the method of operation) NSR applies if the construction project results in the potential to emit[13] air pollution in

[13] The reason for not using the unit's post-modification actual emissions (as opposed to its PTE) in the case of a non-routine change or a change in its method of operation is that the modification or change in the method of operation could change the emissions characteristics of the unit making the pre-change actual emissions unreliable as a predictor of its future emissions for the pollutant in question. For example, emissions of certain pollutants depend on the unit's (or unit plus control system, if one is present) load factor (for example. NO_x emissions from a boiler or PM_{10} emissions from the electrostatic precipitator or ESP) or how close to its maximum design capacity it is run. If the modification or change in the method of operation makes it

(Continued on following page)

excess of certain threshold levels established in the NSR regulations. For a new source, NSR is triggered only if the potential emissions qualify the source as major. For an existing major source making a modification (i.e., the present situation in the case of Duke, where each unit at each plant is a major source), NSR is triggered only if the modification will result in a significant increase in emissions. This increase is calculated using regulatory guidance as will be described later.

In general, the NSR program is administered by state and local air pollution permitting authorities. Each state or local permitting authority is required to incorporate the basic NSR program requirements into its State Implementation Plan (SIP), which is the state's plan to ensure progress toward, or maintenance of, attainment of all National Ambient Air Quality Standards (NAAQS). A state's NSR program may be approved, either by incorporation into a SIP, which is approved by EPA, or by delegation to the state by EPA. If the state designs its own program, EPA may approve it so long as it meets the criteria listed in federal regulations [40 CFR 51]. Otherwise, the state may request delegation of the federal NSR program, as it is written in the federal NSR regulations [40 CFR 51]. For the entire time period under consideration in the present proceedings, the States of North Carolina and South Carolina had a delegation status from EPA for NSR.

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possible that the unit could run at a higher load factor that before modification, using past actual emissions is not useful.

Distinction Between Non-attainment NSR and PSD

The term NSR is used to refer to the Clean Air Act's construction permit program for major sources. However, the major NSR program is actually comprised of two separate programs: Nonattainment NSR and Prevention of Significant Deterioration (PSD). These two programs have separate requirements to address the differing air quality planning needs in the differing areas where they apply. Nonattainment NSR applies in areas where air is unhealthy to breathe – i.e., where the established NAAQS for a criteria pollutant is not being met ("non-attainment" areas). PSD applies to major sources located in areas where air quality is currently acceptable – i.e. where the NAAQS for a criteria pollutant is being met (i.e., "attainment" areas). With the exception footnoted below, the areas, surrounding the various Duke plants were generally in attainment of all relevant NAAQS [40 CFR 52.721] and have been during the time frame relevant to the present proceedings[14]. Thus, except for the Allen and Riverbend plants for certain periods of time relevant to these proceedings, the type of NSR that would apply for the modifications alleged in this case is PSD. Although the nonattainment NSR program would apply for some of the Allen and Riverbend plant modifications, I have conducted this analysis assuming that they are also subject to PSD. The initial emissions-based assessment for both programs is the same.

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[14] It is possible that for certain periods of time relevant to these proceedings the Allen and Riverbend plants, located in Gaston County, North Carolina, were located in an area with a maintenance plan for the criteria pollutant ozone (one of whose precursor pollutants is NO_x).

Determination of Major Sources and Significant Increases

The first step in determining whether new construction or modification is subject to PSD is to define the source and determine its emissions. Next, the source's potential emissions are compared to the appropriate major source threshold defined by law or regulation. Major source thresholds are defined in terms of annual emissions (i.e., tons per year). For PSD (or for nonattainment NSR), the major source threshold is generally 250 tons per year. but, the PSD major source threshold is 100 tons per year if the stationary source belongs to a list of 28 source categories (i.e. industrial groupings) which includes fossil fuel fired steam electric power plants such as each of the Duke plants subject to this litigation [40 CFR 52.21].

A source's potential emissions, (i.e., "potential to emit") is defined[15] as "the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted. . . . , shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable." Enforceable permit conditions can limit a source's potential to emit the maximum amount possible under its physical and operational design. A new source under construction (i.e., a "greenfield" source) is subject to NSR if its potential emissions will exceed the major source threshold. Applicability of PSD to greenfield sources is relatively straightforward, because the emissions

[15] 40 CFR 52.21(b)(4)

from the new source are relatively easy to estimate. The other type of change that can trigger PSD is a major modification at an existing major source. The Clean Air Act defines a modification [40 CFR 52.21] as a physical change or change in the method of operation of a major stationary source that results in an increase in emissions, or emissions of a new pollutant. Examples are a new production line, an equipment upgrade, or reconfiguration of a process. Implementing regulations exempt certain activities from the definition of physical or operational change. These include, for example: routine maintenance, repair or replacement of equipment, increases in hours of operation or production rate not involving physical and operational changes (unless the increase is prohibited under an existing permit), or changes in ownership.[16] If there is no physical change or change in method of operation, or if the change falls under one of the exemptions just described, then PSD or nonattainment NSR does not apply to the change, and emissions need not be determined.

A physical change or change in method of operation (i.e., a modification) is subject to PSD if it results in a significant net emissions increase of any regulated pollutant under the Clean Air Act. Just like the definition of a major source, the ND regulations establish levels that define major modifications, known as significance levels, which vary by pollutant.[17] The provision allows for *net* emissions increases if the source can offer past or concurrent emissions reductions at its other units to

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[16] New Source Review Workshop Manual, Draft, October 1990, Section III.A.

[17] New Source Review Workshop Manual, Draft, October 1990, Table A-4.

counterbalance the increase from the proposed change at a given unit.[18] The net emissions increase resulting from the netting calculation must result in an increase above the significance level for PSD to apply.

For modifications at existing sources, the net *increase* in emissions is compared against the significance level, not the entire emissions for the modified unit(s). In some cases it may be possible to directly estimate the proposed net increase. In other instances, this net increase may need to be calculated as a difference between future estimated or projected emissions and current (or baseline) emissions. If the latter approach is used, both the current or baseline emissions must be known or estimated and the future projected emissions must be determined as well. Current emissions are measured using actual emissions over the recent past, usually designated as the two years preceding the contemplated project.[19] Future increases are generally determined using actual emissions. However, for sources that have not begun normal operations (i.e., those sources that have made non-routine physical changes) there is no ready method to determine their future actual emissions. Instead, the implementing regulations require that, in these situations, the source's potential to emit (which, as described above, is the maximum capacity to emit, except as limited by a permit) be used for estimating post-modification emissions. This calculation is often referred to as the "actual to potential" test. The difference between the future potential and the past actual emissions is compared to the relevant significance level. An exception is

[18] A New Source Review Workshop Manual, Draft, October 1990. Section III.B.

[19] 45 FR 52676, 52705, 52718 (1980).

the electric utility industry, which, for modifications after July 1992,[20] is permitted to estimate future emissions using a special calculation that resulted from a federal rulemaking following a federal court opinion. The utility calculation is established in a rule, commonly known as the "WEPCO rule," which EPA finalized on July 21, 1992.[21] This rule provides that utilities can, upon fulfillment of certain conditions[22] compare past actual emissions to projected future actual emissions. This calculation is often referred to as the "actual to future-actual" test.[23]

Basic PSD Requirements

New major sources and existing sources that undertake major modifications that are subject to PSD must apply best available control technology (BACT). When preparing a BACT analysis, the permit applicant must typically undertake the following steps: (1) identify available pollution control options; (2) eliminate the technically infeasible options; (3) rank the remaining control technologies by control effectiveness; (4) evaluate the most effective controls (considering energy, environmental, and

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[20] Final WEPCO Rule, 57 FR 32314 (July 21, 1992).

[21] Final WEPCO Rule, Section B, July 21, 1992.

[22] EPA, in finalizing the WEPCO Rule in 1992, stated (Section B) that " . . . any utility which utilizes the "representative actual annual emissions" methodology to determine that it is not subject to NSR must submit for 5 years after the change sufficient records to determine if the change results in an increase in representative actual annual emissions." Further, EPA also stated that " . . . change does not increase the unit's emissions factor . . . the utility may submit annual utilization data, rather than emissions data, as a method of tracking post-change emissions."

[23] Final WEPCO Rule, Section B, July 21, 1992.

economic impacts) and document the results; and (5) discuss the appropriate BACT selection with the permitting authority. The permitting authority then specifies an emission limit for the source that represents BACT.

For non-attainment NSR, the corresponding controls are called LAER. In determining LAER, only technological feasibility is considered. Cost-effectiveness is not a consideration. Each PSD applicant must also perform an air quality analysis, which may include pre-application monitoring data, to demonstrate that the new emission increase will not cause or contribute to a violation of any applicable NAAQS or result in a significant deterioration of the air quality. Finally, each applicant must also conduct an analysis to ensure that the increase does not result in adverse impact on air quality related values, including visibility, that affect designated Class I areas, such as wilderness areas and national parks.

Changes that do not trigger NSR/PSD

There are a number of ways that sources can undertake new construction or modification without the need for a major NSR permit. First, as noted above, there are certain activities that are exempt from NSR because they are defined in the regulations as exclusions from the definition of a physical change or change in the method of operation. For example, a change which is a "routine repair or replacement" is exempt from NSR. Certain pollution control projects are also exempt from NSR, even those that increase emissions, if they meet environmental safeguards established by EPA.

Even if a change does not qualify for one of these exemptions, a change at a major source does not trigger NSR if

the emissions increase is below the level defined as significant. Many projects have emissions increases that are below these levels and never trigger NSR. Where a project's maximum capacity to emit would be above the significance levels, a source often uses a common NSR avoidance strategy – a limit on potential to emit, or PTE limit. In a PTE limit, a source agrees to limit the size of the proposed project's emissions increase by taking a permit limit to keep emissions below the significance level. Such limitations can be accomplished by installing modern pollution controls (i.e., by reducing its emission factor), or by limiting some aspect of the unit's operation such as by limiting fuel burned or hours operated (i.e., by reducing its activity factor). Furthermore, even if the proposed change would result in a significant increase and cannot be limited as just described, the source may offer creditable contemporaneous emissions decreases at other units to offset the increase from the proposed change. In such cases, the *net* emissions increase attributable to the project may not exceed the significance level.

IV.2 North Carolina SIP Requirements

The CAA [Section 110 of the Act, 42 U.S.C. § 7410] requires each state to adopt and submit to EPA for approval a State Implementation Plan (SIP) that provides for the maintenance, implementation and enforcement of the NAAQS. Per the CAA, each SIP must include a permit program to regulate the modification and construction of any stationary source of air pollution, including stationary sources in attainment and non-attainment areas of the state, as necessary to assure that NAAQS are achieved. Pursuant to Section 113(a) and (b) of the CAA, upon EPA

approval, SIP requirements are federally enforceable under Section 113 [40 C.F.R. § 52.23].

As noted in the Complaint in this case, pursuant to Part C of the Clean Air Act, North Carolina SIP requires that a permit be obtained before construction or operation of a major modification to a major stationary source in an area designated as attainment. This permit should be obtained under 40 CFR s 52.21(i), and North Carolina Administrative Code at Title 15A. Chapter 2, Subchapter 2D, Section .0530 (15A NCAC 2D.0530), which was effective on June 1, 1981, and approved by EPA as part of the federally-enforceable North Carolina SIP on February 23, 1982, at 47 FR 7836, and amended on June 18, 1990, at 55 FR 23735, and on February 1, 1996 (61 FR 3584).

The North Carolina SIP also requires that no construction, modification or operation of any facility which may result in air pollution shall occur without first obtaining a permit under North Carolina Administrative Code at Title 15A, Chapter 2, Subchapter 2Q, Section .0300 et seq. (15A NCAC 2Q.0300 et seq.). This rule was approved as part of the North Carolina SIP on May 31, 1972 at 37 FR 10892, and amended on February 1, 1996, at 61 FR 3584.

The status of the WEPCO provisions adopted after July 21, 1992 by EPA into the Federal PSD regulations in the North Carolina SIP requires a detailed analysis. On March 23, 1995 the state applied to include WEPCO provisions into the SIP and these were approved by EPA on October 4, 1995 (60 FR 51923) with an effective date of December 4, 1995. However, on February 1, 1996 (61 FR 3584) EPA approved a SIP modification submitted by North Carolina on August 14, 1994 with an effective date of April 1, 1996. This February 1, 1996 version of the SIP

did not the contain the WEPCO provisions. Thus, WEPCO provisions ceased to be in the North Carolina SIP on and after April 1, 1996. Subsequently, the state applied for inclusions of the WEPCO provisions into its SIP on March 19, 1997 and these were approved by EPA on October 15, 1999 (64 FR 55831) with an effective date of December 14, 1999. Thus, after December 14, 1999, WEPCO provisions were again included in the North Carolina SIP.

To summarize, the North Carolina SIP did not contain the WEPCO provisions: (a) before December 4, 1995 and (b) during the period starting on April 1, 1996 and ending on December 13, 1999. The SIP did contain the WEPCO provisions: (c) during the period starting on December 4, 1995 and ending on March 31, 1996; and (d) after December 14, 1999 through the present.

IV.3 South Carolina SIP Requirements

As stated in the Complaint in this case, pursuant to Part C of the Clear Air Act, the South Carolina SIP requires that no construction or operation of a major modification to a major stationary source occur in an area designated as attainment without first obtaining a permit under 40 CFR 52.21(i), and South Carolina Regulation 62.5, Standard No. 7, which is part of the South Carolina SIP that was approved by EPA on February 10, 1982, at 47 FR 6017, and amended on October 3, 1989 (54 FR 40662) and most recently amended on August 20, 1997 (62 FR 44219).

Furthermore, the South Carolina SIP, DHEC Reg. 62.5 No. 7, s. III.A requires a construction permit for all major modifications. The South Carolina SIP, DHEC Reg. 62.5 No. 7, s. IV.A, requires that a major plant or major modification apply the best available control technology to each

pollutant subject to regulation under the Act that the major plant emits in significant amounts.

Also, the South Carolina SIP requires that no construction, modification or operation of any facility which may result in air pollution shall occur without first obtaining a permit under South Carolina Regulation 62.1, Section II, which is part of the South Carolina SIP that was approved by EPA on May 31, 1972, at 37 FR 10892, and amended on February 4, 1992, at 57 FR 4158.

The WEPCO Rule has not been adopted by the South Carolina in an EPA-approved SIP as of this writing. However, since the modification at the only South Carolina unit in the case (Lee Unit 3) occurred in 1989/1990, prior to the adoption of even the Federal WEPCO provisions, the point is moot.

V. ESTIMATING EMISSIONS AT POWER PLANTS

The entire regulatory structure relating to the control of air pollutants is predicated upon the ability to quantify the emissions of pollutants into the atmosphere from the source or activity in question. Without this ability, the very foundation of a regulatory approach could not exist. There are numerous reasons as to why emissions estimates may be necessary, including: ability to understand the impacts of such emissions from a source on the surrounding and distant environment; the ability to demonstrate compliance with specific regulatory requirements, such as permit restrictions and the payment of fees; and the ability of anticipate potential future impacts even before they occur. Thus, emissions estimates may be used to reconstruct historical emissions, assess current emissions, and ever

predict future emissions from a given source such as a power plant boiler.

There are numerous methods that can be used to assist in developing such emissions estimates. These are discussed in some detail below. It should be noted that not all of the methods discussed can be used in all cases (i.e., some methods are better suited for the reconstruction of historic emissions while others may be better suited for making future predictions, etc.).

V.1 Direct and Indirect Measurements

If the release of the pollutants NO_x, SO_2, and PM from a power plant boiler smoke stack into the atmosphere is occurring at the time the emissions estimate is being prepared, it may be feasible to directly or indirectly measure and estimate the rate of release of these pollutants and the total quantity of each pollutant emitted in a given time period. Where continuous real-time measurement is not possible, or where a prediction of future emissions is necessary, emissions can be indirectly estimated using source specific information, information about the source category's emission rates at periodic intervals obtained from limited "source tests", and mathematical estimation techniques.

Two measurement methods that have been successfully used to quantify the rate of release, or emission rate, of NO_x, SO_2, and PM from power plant boiler smoke stacks are source testing and continuous emission monitoring systems (CEMS). Each of these methods provides an actual quantity (i.e., mass) of emissions being released for the period of the time for which the information is collected. Unfortunately, to quantify emission before and

after the specific modifications alleged by EPA at the various Duke units, neither of these data sources is available to be used on a consistent basis for each pollutant of interest for all alleged modifications.

Source testing involves the extraction of a sample of flue gas, binding it in a chemical solution, or in water, and transporting the sample to a laboratory for chemical analysis. The typical sampling period for source tests is several hours. The operating conditions for these tests are typically prescribed by the emission limit regulation, and often stipulate that the tests be conducted at "representative," "typical," "maximum," "design," or some other specified operating rate (i.e., exceeding 90% of maximum operating capacity, etc.). Source tests, done pursuant to standard protocols, can provide an accurate representation of the mass of emissions for the specific pollutant if interest emitted during the sampling period. This data, coupled with other process or activity data (such as the amount of coal burned during the same period as the source test or the electricity generated during the same period as the source test, etc.), can be used to generate emission factors (i.e., mass of emissions of the specific pollutant per unit of activity such as coal burned or electricity generated) for the unit where the test was conducted. These emission factors can then be used to estimate mass emissions of pollutants using only process or activity data for other time periods when the unit is operating at the same or "similar" conditions (i.e., similar fuels, similar generating rate, etc.) as during the source test. Source tests are typically conducted at an individual power plant unit no more than once per year, and depending on state or Federal regulation requirements, only once in the life of a power plant unit for initial emission limit compliance

demonstration. Source tests, however, may not always offer a reliable means for quantifying power plant emission rates over extended periods of time, due the short term nature of the test procedures, and the variability of actual operating conditions relative to the test's operating conditions, especially if the unit generation rate varies considerably over time, or if the fuel mix changes.

In this case, Duke provided various source tests at each of the units, some covering the period of interest for PM only. No source test data were available for SO_2 and only few source tests were available for NO_x as of the time this report was written. Thus, given the general lack of source test data, use of actual unit specific source tests for estimating emissions for all pollutants was not practical in all cases.

CEMS are essentially automated source tests. CEMS extract a sample of stack gas, and transport it directly to an on-site analyzer for immediate sample analysis. These are known as extractive CEMS. Some CEMS actually conduct the analysis within the stack, and are known as in-situ CEMS. CEMS, for certain pollutants, are currently required for all power plant boilers that are subject to certain Federal emission standards. For example, all the Duke units subject to the current proceeding are required to have SO_2, and NO_x CEMS under the Acid Rain regulations of Title IV of the Clean Air Act.

The Acid Rain regulation has required continuous measurement, and reporting of hourly emission rates of NO_x, and SO_2 beginning January 1, 1995. The CEMS and measurement data from facilities subject to the Acid Rain regulation are subject to rigorous quality assurance and quality control (QA/QC). As a result of the QA/QC procedures, the

CEMS measurement data are considered a reliable indication of emission rates. The electric utilities operating the CEMS have a vested interest in maintaining the accuracy of the equipment because one means of complying with the Acid Rain SO_2 emission limits is to trade emission credits. A facility that is able to operate a level resulting in annual emissions below their annual limit is allowed to trade, or sell, the resulting emission credits to another facility that has or expects to exceed their limit. The second facility can deduct the emission credits from their actual emissions as a means of attaining compliance with annual emission limits. Because the rigorously vetted Acid Rain CEMS data are only available from the beginning of 1995, I have used acid rain data, where available, to support my emissions calculations in the post-1995 period[24].

Thus, where possible (i.e., available as of this writing) and appropriate, stack tests or CEM data were used. In other cases, AP-42 was used.

V.2 Various Estimating Techniques

For the purpose of determining historical and/or future emission rates, such as in the case of PSD for new or modified sources, actual emissions such as CEMS and stack tests are not usually available for determining emission rates for the multi-year temporal frame of reference needed for analysis. Instead, emissions must be

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[24] Comparing acid rain data for sulfur dioxide with other estimating techniques such as the AP-42 method discussed later, I found general agreement among the methods and I therefore used AP-42 methods to calculate sulfur dioxide emissions in all cases. However, for NOx, I used acid rain data where available and as appropriate for post-1995 emissions estimates.

estimated mathematically using the direct relationship between various activity factors and parameters such as coal consumption, coal constituents, boiler and burner type and the knowledge of formation and behavior of NO_x, SO_x, and PM emissions. The emission estimating techniques available for analysis include:

Material Balance (also known as Mass Balance);

Emission Factor/Activity Factor technique using site-specific emission factors;

Emission Factor/Activity Factor technique using AP-42 Emission Factors.[25]

The material balance approach, which depends on various limiting assumptions, is a standard method used in process engineering analysis based on the concept of conservation of mass, meaning that whatever goes into the boiler must come out at the other end in one form or another. The emission factor/activity factor techniques (hereafter called emission factor techniques for simplicity) using site-specific, or source test-derived emission factors, and AP-42 emission factors are other approaches that do not rely on the restrictive assumptions inherent in the mass balance approach. In both of the latter cases, however, an emission factor that relates the activity of the production to emissions is used to estimate emissions. Each of these three methods are described below, along with a discussion of the efficacy of each method for this analysis.

[25] Compilation of Air Pollutant Emission Factors AP-42, Fifth Edition, Volume 1, US EPA.

V.2.1 Material Balance

Material balance emission estimates are an accounting of all material entering and leaving a device (in this case the boiler) that constitutes the source of emissions. In order to use material balance appropriately, the source should generally be operating in a steady-state or time-invariant mode. Further, this approach can only be used for compounds whose chemicals reactions of formation and destruction are well understood. In the absence of these assumptions, the mass flow rates of each input stream to and output stream from the boiler, and the concentration or percentage of the pollutant and pollutant-forming constituents (also called precursors) within each stream must be quantified. For power plant boilers, the ash and sulfur contents of the coal, and the coal feed rates are examples of input precursors and streams, respectively. An algorithm, or mathematical formula, that models the pollutant formation process is then used to define the pollutant generation in the output stream (the exhaust or flue gases). The quality of the material balance estimate depends on the accuracy of the algorithm used to predict the rate of pollutant formation and the accuracy of the input data. Material balance estimates for NO_x emissions are not reliable because the NO_x formation process is very difficult to model. Estimates of SO_2 using a mass balance are more reliable, because the chemical reaction equation for the oxidation of sulfur to SO_2 (neglecting the minor amounts of SO_3 that can also form) can be used as the pollutant formation algorithm.

To accurately use the mass balance approach for a boiler, it is important to identify all output pathways or streams, and the quantity of pollutant (and/or materials that form pollutants) that leave the boiler via each stream.

For example, a small amount of the sulfur entering the boiler in the fuel, adheres to the ash, and leaves the boiler with the ash, rather than as SO_2. This phenomenon is known as sulfur retention. In order to account for sulfur retention in the emission estimate, a retention factor is typically applied. The sulfur retention factors for coal-fired power plant boilers ranges from 4-15% of the total sulfur entering the boiler. The apportionment of the ash entering the boiler in the coal must also be accounted using a similar ash retention factor. Ash retention factors for utility boilers range from 15-50%. Another complicating issue for estimation of PM emissions using a material balance technique is that some of metals, such as mercury, or metal oxides present in the coal do not leave the boiler as solid matter or fly ash, but evaporate and leave in gaseous form that can condense to form particulates. A strict material balance applied to the PM emission rate estimation must include a factor for this secondary pathway of particulate formation.

V.2.2 Emission Factors and Activity Factors

An emission factor is a representative value that relates the quantity or mass of a pollutant released to the atmosphere with an "activity" of the facility associated with the release of the pollutant. The rate of the "activity" of the facility as a function of time is called the activity factor. Emission factors are expressed as the mass of the pollutant released divided by a quantity related to the activity associated with the pollutant release. For example, assume that a factory producing bicycle frames (the "activity") conducted a study that measured plant boiler SO_2 emissions and frame production rates for a specified period. From this study it was determined that one tenth

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of a pound of SO_2 is emitted from the coal-fired factory boiler for each frame produced. In this example, an emission factor of 0.1 lb SO_2 per bicycle frame produced can be developed. This emission factor can be expressed as 0.1 lb/frame. Thereafter, presuming that this emission factor was developed under representative conditions, in order to estimate the annual SO_2 emission rate, one would simply multiply the number of frames produced in a year (called the activity factor) by the emission factor. If 100,000 frames were produced that year, 10,000 lb, or five tons of SO_2 would estimated to have been emitted during that same one-year period. If 200,000 frames were produced, then 20,000 tons of SO_2 would be the estimated emissions.

This emission factor method assumes that the relationship between the activity and the emissions is reasonably constant. Thus, this approach would be valid if the boiler in the example only supported frame production, and did not provide energy to other needs such as heating administrative buildings that place variable energy demand. In the example described above, it was assumed that all boiler activity was directly associated with activity of frame production. If the boiler also supplied energy to other processes at varying levels, the relationship between SO_2 emission rate and frame production would also vary, and the emission factor discussed previously would not apply to those variable conditions that did not exist during the study.

Another important concern is that the SO_2 emission factor developed in the example above can be used to reliably estimate SO_2 emissions only if the sulfur content of the coal remained constant, and if the amount of coal used to produce each frame remained constant. If the coal

supplier was changed after the emission factor study, and the sulfur content increased, then the amount of SO_2 emitted for each pound of coal burned would also increase. This is because the amount of sulfur entering the boiler with each pound of coal had increased so that, although the amount of coal burned may not have increased, that amount of sulfur entering the boiler has increased. Similarly, if the boiler could not produce the energy needed for frame production at the same thermal efficiency, due to malfunction or deterioration of some boiler component, then more coal would have to be burned to produce the energy necessary to manufacture each frame. Again, the rate of sulfur entering the boiler would increase – this time because of the coal feed rate increase – and an increase in the SO_2 emission rate would result, although the number of frames produced would be the same.

Air pollution control devices (APCD) are often used to remove pollutants from the flue gas before exiting the stack and entering the atmosphere. Power plant emissions of NO_x, SO_2, and PM can be controlled using a variety of technologies to treat the flue gas. The capacity of APCD to remove pollutants is often expressed as removal efficiency. The removal efficiency is the percent of the total mass of the pollutant in the flue gas entering the device that is removed from the flue gas before leaving the device. Emission factors often include a component to account for the APCD removal efficiency.

V.2.3 Emission Factor/Activity Factor technique using site-specific emission factors

Emission estimates are sometimes developed using emission factors derived from one or more source tests as discussed earlier, used in conjunction with activity data for

a different time frame. As stated previously, source test sampling periods last for only a few hours and are typically conducted at a high operating rate relative to maximum capacity. Thus, the source test data are very accurate for the test time period, but are only accurate for other periods of operation if the same or reasonably similar operating conditions are present. It is important to realize that for PSD analysis, the time frame used is typically several years and emissions are evaluated in terms of tons/year. Therefore, if operating conditions vary greatly over the time period of the PSD analysis, using an emissions factor based on one or very few source specific stack tests may not be the most accurate estimate of emissions. This is usually the case with a utility boiler such as the Duke boilers that are the subject of this proceeding. The mass emission rates, in terms of tons/year, of NO_x, SO_2, and PM from power plant boilers are affected by many factors, including boiler efficiency, fuel feed rate, as well as the sulfur and ash content of the fuel. Each of these factors can vary all the time, although some vary more than others. Since representative source test data are not available for all of the time periods of interest for all pollutants of interest for the Duke modifications, site specific emission factors could not be developed for NO_x and SO_2.

V.2.4 Emission Factor/Activity Factor technique using AP-42 Emission Factors

To support air quality planning by state and local agencies and to allow sources to estimate emissions, the EPA has developed and maintained an emissions estimation database consisting of specific emission factors by source category. EPA has derived or collected these

emission factors by collecting emissions data from sources in that category and coming up with composite factors that represent normal average operations for that particular source type. These emission factors are primarily used to estimate emissions over long time frames (i.e., years) for individual sources, and groups of sources for air quality planning and permitting purposes. EPA's AP-42 emission factors are well regarded as reliable emission factors to estimate emissions of certain source types and are used by EPA, state air quality agencies, industry trade associations and research institutes, and individual facilities to estimate emissions for a variety of applications. EPA and state air quality agencies have applied the AP-42 technique for estimating the impact of air pollution control strategies on local, regional, and national air quality. Individual facilities sometimes use AP-42 emission factors to estimate annual emissions for permit applications, and annual emission statements. Duke has often used AP-42 emission factors in regulatory submissions and internal analysis.

The AP-42 emission factors are generally developed to represent long-term average emissions. This methodology, applied to power plant boilers, is documented in the "Compilation of Air Pollutant Emission Factors AP-42, Fifth Edition, Volume I: Stationary Point and Area Sources, Chapter 1.1, Bituminous and Subbituminous Coal Combustion," portions of which are set forth in Attachment E. The emission factors for electric utility power plant boilers that burn coal were developed using source test emission rates, fuel feed rate, fuel sulfur and ash content, electricity generation rate, and air pollution control equipment removal efficiency from numerous power plants. These factors are intended to represent

actual emission rates during a range of operating conditions. The source testing conducted for AP-42 emission factor development is typically conducted at normal operating conditions.

For coal-fired power plants, EPA has developed a number of different AP-42 emission factors that are very reliable in estimating emission at these sources. These emission factors are specific to: (1) the vintage or age of the boiler (i.e. pre- or post-NSPS Da): (2) the boiler design (e.g. cyclone-fired versus tangential fired) and (3) the different coal types being burned in the boiler (e.g. lignite versus sub-bituminous). In other words, there are specific AP-42 emission factors for different boiler types, depending on the boiler's age, the boiler design, and the type of coal the boiler burns.

First, the age, or vintage of boilers is considered in the classification of AP-42 emission factors for electric utility power plant boilers. Different emission factors are available for boilers not subject to the NSPS of 40 CFR part 60, and for boilers subject to NSPS.

Second, the boiler design is considered in the classification of AP-42 emission factors for utility boilers. The characteristic of the boiler most relevant to its emissions is the burner configuration. The three general configurations are wall firing, tangential firing, and cyclone furnaces. Wall-fired boilers can be either single wall-fired, with burners on one wall firing horizontally into the furnace, or opposed wall-fired, with burners mounted on two opposing walls. For purposes of selection of an appropriate AP-42 emission factor, the boilers in Duke's Belews Creek plant are most accurately considered to fall into this category. The burners of tangential- (or corner-) fired boilers are

mounted in the corners of the furnace area. Except for the Belews Creek plant, the rest of the boilers at all of the other Duke units are tangentially fired. Thus, different AP-42 emission factors are available for wall-fired or tangential-fired boilers.

Third, AP-42 emission factors are classified by the type of coal burned by the boiler. Coal is classified into several categories, including lignite, sub-bituminous, bituminous, and anthracite. The major distinguishing characteristic between the coal categories is the carbon content, volatile matter content, and moisture content. Bituminous coal was combusted at the Duke units under consideration during the relevant time frames and so only bituminous coal emission factors are relevant to this proceeding.

The emission factors contained in AP-42 are rated to provide an indication of appropriateness for estimating average emissions for source activities. The emission factor rating scale ranges from "A" – excellent, to "E" – poor. An "A" rating indicates that the factor has been developed from source test data derived from tests conducted with a sound methodology, from data reported in enough detail for adequate validation, and from data that were chosen at random from many tests conducted at a sufficiently sized population of facilities. A "D" rating indicates that the factor is developed from moderate quality test data from a small number of facilities that may not represent a random sample, and there may be evidence of variability of the emissions measured within the source population. The data quality of AP-42 emission factors used in the present analysis is "A"

V.2.4.1 Applying the AP-42 Emission Factors

Once the appropriate AP-42 emission factor for a utility boiler has been determined, emissions from that boiler are estimated using the AP-42 emission factor, the coal feed rate (the typical activity factor), the sulfur content of the coal (for sulfur dioxide), and the ash content (for PM). For estimating NO_x emission rates, the NO_x emission factor is multiplied by the coal feed rate (in tons/unit of time) to calculate a NO_x emission rate in units of tons NO_x/unit of time. To calculate SO_2 emission rates, the SO_2 emission factor is multiplied by the coal feed rate, a numerical multiplier, and the coal sulfur content (in percent of weight of coal). If this methodology is used, PM emission rates are calculated by multiplying by the coal feed rate, and the coal ash content (in percent by weight of coal).

It should be noted that some additional calculations may be necessary to generate the proper activity factors. For example, since, the AP-42 emission factors are denoted in terms of mass of pollutant per mass of coal used or burned, the most convenient activity factor is the mass of coal used or burned over the time period of interest. In some cases, this activity factor is directly available if the coal use amounts have been recorded. In other cases, however, this rate can be calculated or estimated from other activity factors (such as the amount of gross electricity generated or lost due to malfunction of a specific component, or MWHrs) if the relationship between the various activity factors is known or can be estimated. In the present proceeding, the amount of coal necessary to generate a gross MWHr of electricity at a specific Duke unit can be calculated from actual historical coal usage and electricity production data. Thus, from a knowledge of

electricity generation rates or MWHrs over the time period of interest (whether they be future rates, or projected generation rates due to specific modifications, or lost generation rates attributable to the malfunction of specific components) one can estimate coal use activity factors which can then be used to estimate emissions using appropriate emission factors.

VI. EMISSIONS ESTIMATING METHODOLOGY FOR THIS CASE

Several factors, which are discussed below, were considered in making the decision about which methodology to use to estimate emissions for the PSD analysis described below.[26] The primary criteria used to select the emission estimation methodology and data sources include:

- data availability, for the time frames of interest;
- capacity to characterize emissions of NO_x, SO_2, and PM for conditions representative of operation relevant to the estimation (i.e., actual, potential, projected operations);
- accuracy and reliability;
- ability to reproduce results.

A discussion of each consideration follows, addressing how each method conforms with the criteria used to select the emission estimating technique. The result of this

[26] Separate calculations in connection with the North Carolina and South Carolina SIPs were not performed since the PSD calculations also support the alleged SIP violations at issue here.

analysis is that, except for use of acid rain data for NO_x in the past-1995 time frame and the use of PM source-test based factors[27]. AP-42 emission factors in conjunction with direct activity factors such as coal usage and sulfur content, or indirect activity factors such as gross electricity generation rates or GADS generation loss data was deemed to be a reliable and accurate method of determining emissions at the various Duke plants for PSD analysis.

First, any emission estimation method must be able to rely on available data for the time frame needed for the analysis. Emissions estimation methods used for PSD analysis must be capable of identifying the two-year annual average actual, or "baseline" emissions for the period that precedes the modification[28] subject to the PSD analysis. In some cases, the baseline may involve two-year annual avenge emissions for longer time frames preceding the modification. Where Duke had made source test data available (e.g., PM or, effectively acid rain NO_x data for the post-1995 time period) these data were used. In other cases, the techniques that could be used for the time periods needed were either material balance techniques or the emission factor techniques using source test-based emission factors or AP-42 emission factors and the available activity factors such as Duke fuel and electricity generation or loss data.

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[27] In the hierarchy of emissions estimation methodologies, using source specific emissions data is preferable to other methods, including AP-42 emissions factors. This is especially true when the AP-42 data quality rating is not high. Thus, in this case, the numerous PM source tests were used in lieu of other methods.

[28] This annual period is typically not coincident with a calendar year – thus, the data must support the calculation of any "rolling" 12-month average emissions.

The second criterion used to select the emission estimation technique was the capacity to characterize emissions of NO_x, SO_2, and PM for conditions representative of actual, potential, and projected operations. As stated earlier, when extensive source test data were available they were used. However, this was not possible for all cases. Similarly, the mass balance technique does not fairly characterize emissions of SO_2 for conditions representative of all operations (especially future projected and potential) and certainly does not apply very well to NO_x emissions because the underlying NO_x algorithm is not readily identifiable in specific situations. However, the emission factor technique using AP-42 emission factors and using activity factors such as Duke's operating and fuel data and/or electricity generation data can best provide estimates of emissions of NO_x and SO_2 for all necessary conditions.

The third criterion for deciding on a methodology for accurately predicting emissions was the accuracy and reliability of the method to determine emissions with minimal error for the different units. The accuracy of a measurement or estimation method can only be determined relative to a method of known accuracy. In the case of emissions measurement and estimation when source test data are not used, only EPA source test Reference Methods found in 40 CFR 60, Appendix A, or CEMS conforming to 40 CFR 75 requirements produce emission measurement data of known accuracy. For this proceeding, the emission factor technique using AP-42 emissions factors was selected as the method that produced the most accurate results for the time frame of interest with the data and information available.

The final criterion for selection of the emission estimation method was the reproducibility of results. The calculation technique using activity factors and emission factors (such as the AP-42 emissions factors), and the activity factor data provided to EPA and others such as NERC by Duke are well documented and generally available. The "*Compilation of Air Pollutant Emission Factors AP-42, Fifth Edition, Volume 1: Stationary Point and Area Sources, Section 1.1, Bituminous and Sub-bituminous Coal Combustion*" is available on the EPA Internet web site. The Duke generation and fuel data are publicly available from the company itself. Duke also had the necessary generation loss data attributable to specific component failures and had provided such data to NERC. The emission factor technique using AP-42 emissions factors is simple, straightforward, and does not require assumptions that would lead to non-reproducible results.

For all these reasons, the emissions factors technique using AP-42 emission factors and using Duke fuel use and/or generation data, was selected as the best technique for estimating emissions of NO_x and SO_2, for the various Duke units. For post-1995 NO_x calculations, acid rain data was used. For PM source test data were used.

The specific AP-42 emission factors used for the analysis for SO_2 (all units) and NO_x (all tangential fired units) are shown in Attachment G[29]. These are the

[29] It should be noted that although AP-42 emission factors (with data quality rating "A") were used for all units. I compared SO_2 acid rain data (after 1995) to the SO_2 AP-42 emission factor and found that there was close agreement between these methods. Therefore, although I could have used SO_2, acid rain data for posi-1995 modifications. I continued to use the AP-42 emission factor approach for SO_2 in all cases.

emission factors for boilers firing pulverized bituminous coal with tangential fired boilers and were obtained from the "*Compilation of Air Pollutant Emission Factors AP-42. Fifth Edition, Volume 1: Stationary Point and Area Sources, Section 1.1, Bituminous and Subbituminous Coal Combustions,*" portions of which are provided in Attachment E. NO_x emissions for the cell-fired Belews Creek units were estimated using acid rain data. The emission factors in Attachment G used in the NSR evaluation emission calculations each have an "A" quality rating.

V1.1 PSD Calculations

VI.1.1 "Unit" Emissions Calculations

In order to support the emissions calculation comparisons for the PSD applicability portion of the current proceedings discussed later in this section, several types of "unit" or basic calculations were performed.[30] Each of these "unit" or basic calculations can then be used, in a variety of combinations, to analyze the effect of a modification on emissions. These unit calculations are discussed first in this subsection; following this discussion, I explain the variety of emissions calculation comparisons (each of which utilizes these unit calculations) that one could consider in assessing PSD applicability. Although the regulations do not require all of these comparisons to be conducted in every case. I have presented an array of calculation types that could have been conducted by Duke pertaining to the modifications at issue. Finally, the

[30] Please note that in this context "unit" refers to the basic building blocks of the emissions calculations and tests – it should not be confused with the various generating units at specific Duke plants.

section concludes by describing the calculations I would recommend should have been performed for the PSD analysis.

Unit Calculation A – Actual Annual Average Emissions (tons/year)

For purposes of establishing baseline, actual annual average emissions in tons/year were calculated for each pollutant (NO_x, SO_2, and PM) for each modification at each unit (a) for the prior 24 month period preceding each modification; and (b) for the highest continuous 24 months out of the prior 60 months preceding each modification[31]. In each case, these emissions calculations were conducted as follows:

Actual Annual Average Emissions (tons/year) = Sum of relevant 24 Actual Monthly Average Emissions (tons/month) / 2;

where.

[31] For non-PMP units, the modification was usually accomplished in a particular outage and these time periods (i.e., prior 24 months or high 24 months in the preceeding 60 months) were identified based on the outage in which the modifications were accomplished. For PMP units, since they were usually shut down for fairly long periods of time (anywhere exceeding 3 to as many as 11 years), two sets of baseline calculations were conducted – the starting point in time for Baseline A (against which the prior 24 months as well as high 24 of prior 60 months time periods were identified) was the time when the unit was brought back into the generating mix after PMP; for Baseline B, the starting point in time was the estimated point in time within the PMP period when the major modifications were actually conducted. The establishment for the time frames for Baselines A and B were done per discussions with Mr. Robert Koppe as well as an analysis of coal use and generation data provided by Duke.

Actual Monthly Average Emissions (tons/month) = Actual Monthly Coal Usage (tons/month) x Emission Factor (lb/ton coal or lb/MMBtu) x Heating Value (Btu/lb coal, if needed) x 1/2000 (tons/lb).

For NO_x and SO_2, the Emission Factor, published in AP-42 or from Acid Rain data was used. In order to determine this factor, the actual monthly sulfur contents as provided by Duke were used. For PM, the emission factor from source tests was typically in units of lb PM/MMBtu of heat released. Thus, in addition to monthly coal use, I also used the monthly average heating value of coal (Btu/lb coal) also provided by Duke[32].

Unit Calculation B – Potential Annual Emissions (tons/year)

Potential annual emissions were calculated for all post-modification periods. In each case the emissions calculations were conducted as follows:

Potential Annual Emissions (tons/year) = Higher of Maximum Gross or Net Unit Capacity[33] (MW) x 8760 (hours/year) x Activity Conversion Factor (tons coal/MWg-hr) x Emission Factor (lb/ton coal or lb/MMBtu) x Heating Value (Btu/lb coal, if needed) x 1/2000 (tons/lb).

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[32] It should be noted that although other fuels were used at many of the Duke units – such as fuel oils for startup or even other materials such as used tires, etc., given the relatively minor amounts of heat generated by these materials as compared to coal, I have not considered these ancillary fuels in the present calculations.

[33] In several cases Duke reported Maximum Net Capacity that was higher than the Maximum Gross Capacity.

The activity conversion factor denoting the mass of coal necessary to generate each gross MW-hr of electricity was calculated for each unit from actual coal usage and actual gross generation (MW-hr). When using emission factors that fluctuated in time (due to varying actual sulfur contents or varying source tests for PM), I used maximum values of these parameters during the relevant time periods, when estimating the unit potential to emit for the respective pollutants. For situations where there were concurrent or anticipated low-NO_x modifications, in order to estimate future potential emissions for NO_x. I used the estimated lower-NO_x emission factor (typically assuming a 30% reduction in NO_x emissions from pre-modification conditions) consistent with the lower NO_x technology performance that Duke would have anticipated. Comparing NO_x emissions from acid rain data, this 30% reduction assumption is usually higher than what Duke in fact achieved after implementation of its various low NO_x projects. This method is therefore conservative, and results in an understatement of the likely NO_x emissions after the modification.

Unit Calculation C – Projected Emissions Increases (Derived from Duke Planning Documents)

For each of the modifications in question, Duke provided various documents and extensive planning projections that anticipated the impacts of the expected modifications, generally in terms of future projections of unit capacity factors for periods up to 10 years after the modification. These documents were analyzed by other

experts[34] and I was provided the expected annual future (for up to 10 years) capacity factors for that Duke had projected for each unit roughly prior to the modifications in each case. I used these capacity factor projections to first estimate future annual generation from each unit for specified future years as follows:

Future Annual Generation (MWhr/yr) = Unit Capacity Rating (MW) x 8760 (hours/yr) x Projected Capacity Factor for specified year (fraction)

I then used the following approach to estimate emissions corresponding to these future annual generation estimates as follows:

Future Annual Emissions (tons/year) = Future Annual Generation (MWhr/yr) x Activity Conversion Factor (tons coal/MWg-hr) x Emission Factor (lb/ton coal or lb/MMBtu) x Heating Value (Btu/lb coal, if needed) x 1/2000 (tons/lb).

In this case (as different from the potential to emit case discussed in Unit Calculation B earlier, I used the average values of sulfur content and PM source tests when developing the appropriate emission factors.

The "activity conversion factor" is the same as discussed earlier for the calculation of potential emissions earlier.

[34] See expert report of Mr. Biewald in this case.

Unit Calculation D – Projected Actual Emissions Changes Derived from GADS Data

Historical GADS data were analyzed by other experts[35] to determine the outages associated with specific boiler components that were later modified or replaced during each of the alleged modifications in this case. Details of how the GADS data were analyzed are provided elsewhere [see expert report of Mr. Robert Koppe]. Once the relevant GADS data were identified, activity factors such as generation utilization loss data was aggregated by month, as needed, and projected future actual emissions changes were calculated by summing the past actual monthly emissions attributable to the gross electricity generation loss activity factors discussed above for the same period. The presumption is that if the specific component causing the outage (which caused loss in unit utilization) was modified or repaired, the cause of the outage would be removed and the unit utilization would not be further impaired from that cause. As appropriate, the effect of the change on the pollutant emission factor was also considered. For example, when concurrent low-NO_x technologies were also installed at a particular unit during the same outage as an alleged modification, the NO_x emission factor was appropriately adjusted (i.e., lowered) in converting the GADS activity factor data to NO_x emissions.

Conversion of the GADS-derived gross electricity generation loss activity factor data (in gross MWhr/year) during specific annual time periods (e.g., for the immediate 24 months preceding a modification, or for the

[35] See expert report of Mr. Robert Koppe in this case.

emissions-based highest 24 out of the prior 60 months preceding a modification, etc.) to emission changes was performed as follows:

Emissions Changes Associated with GADS-Derived Generation Losses (tons/year) = GADS-Derived Generation Loss (gross-MWhr/yr) including Utilization Factor[36] x Activity Conversion Factor (tons coal/MWg-hr) x Emission Factor (lb/ton coal or lb/MMBtu) x Heating Value (Btu/lb coal, if needed) x 1/2000 (tons/lb).

The activity conversion factor is the same as discussed earlier for the calculation of potential emissions.

VI.1.2 PSD Emissions Comparison Tests

Once the unit calculations above were completed, they were combined to formulate various emissions comparison tests that one could have used to assess the applicability of PSD for the various modifications. Again, although the regulations do not require a source to conduct all of these comparison tests in every case, I describe a variety of possible comparison tests below. Some of these tests are not specifically contemplated by regulators but were nonetheless performed here to anticipate calculations or comparisons that might be offered by Duke (See Attachment G). Following this general discussion, I have identified the specific calculations or comparisons that, based on my experience, should have been performed for each modification.

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[36] The Utilization Factor was provided from Mr. Koppe. See his expert report for a discussion on the relevance of this factor and how it was estimated.

1. Prior Two Year Actual Average Emissions Versus Potential to Emit After Modification

In this method, the actual emissions for the prior 24 continuous months (two years) before the modification[37] were calculated and compared with the potential to emit for the unit after modification. In other words, the Unit Calculations A and B discussed earlier were performed and compared.

1a. Prior Highest Two of Five Year Actual Average Emissions Versus Potential to Emit After Modification

This is similar to Comparison Test 1 above; however, for the period prior to the modification, the highest actual emissions in any continuous 24 month period within the prior 60 months before the modification were compared to the PTE after the modification. The PTE calculation is the same as that in Comparison Test 1. It should be noted that the 24 month period in which the actual emissions may be highest can vary by pollutant – i.e., there can be three separate 24 month periods – one each for NO_x, SO_2, and PM within the prior 60 months of the modification. Also, it should be noted that for PMP units, two different baseline periods were identified as discussed earlier.

[37] The smallest calculation time period is a calendar month. It is also assumed that a particular modification was initiated and completed within a specific outage that began on a certain date and ended on a certain date. Depending on the starting date of the outage, either the previous full calendar month (if the outage began towards the beginning of a calendar month) or the month of the outage itself (if the outage began towards the end of a calendar month) was used as the last month before the outage.

2. Before and After Modification Emissions Difference Based on Company Capacity Factor Projections

In this method, the emissions "delta" is estimated by comparing the baseline emissions as calculated using Unit Calculation A (using the period 24 months prior to the modification for modifications when the WEPCO Rule did not apply or using the 24 month period within the prior 60 month period with the highest emissions for modifications when the WEPCO Rule applied) with the company projection calculations conducted using Unit Calculation C discussed earlier. In making this comparison, I used the company projections for future years 9 and 10[38] [in one case (Buck 3) only years 8 and 9 were available and in another case (Belews Creek Unit 2, 1999 Mod) years 8 and 9 were used since year 10 had a non-representatively low capacity factor presumably due to an anticipated turbine outage] with the prior 24 month baseline.

[38] The preferred choice to use years 9 and 10 (or 8 and 9 as noted above) for this comparison was made based on several considerations: (a) Duke had made projections as far as 10 years for a reason, namely that the 10 year planning horizon was a reasonable basis for future unit operations; (b) in the case of the PMP units, Duke's decision to gradually ramp up the unit capacities factors in the years following PMP (essentially converting these previously peaking or load-following units into base-loaded units as its system load increased) rendered the choice of other years (say years 1 and 2 or years 4 and 5, for example) moot since these other choices would not be compatible with how Duke intended to run the units in the foreseeable future; (c) years 9 and 10 were the farthest future years with forecasted capacity projections that shed light on Duke's intended plan for running its units; and finally, (d) consistency in using similar time frames for all units for purposes of making emissions estimates.

3. Emissions Change Based on GADS Activity Factor Data for Two Years Before Modification

In this method, the emissions change corresponding to a particular modification was directly estimated based on GADS-based activity factors such as recovered capacity, appropriately adjusted for capacity or utilization factor, as needed. In other words the Unit Calculation D discussed earlier was used to estimate this emissions change directly. For units that entered the PMP program, GADS loss data are often sparse. This is because, even prior to entering PMP, these units were not running very often and, there was ample opportunity to make relevant repairs to components, as needed, during such downtime.

VI.1.3 Discussion

The calculation comparison tests provided above for PSD are not exhaustive; rather, they are examples of plausible approaches that could have been used by Duke to assess the impacts of the various modifications on the emissions from its various units.[39] I am certainly not suggesting that all of these tests should have been performed. However, based on my experience, *some* of these tests should definitely have been performed, in all cases

[39] It should be noted that netting calculations, although allowed by the PSD regulatory program, were not performed because the data required for performing such calculations, although requested from Duke, had not been received. Duke has not provided information on what it considers to be contemporaneous increases and decreases relevant to this calculation. However, as noted in the text, netting was implicitly considered when contemporaneous (i.e., at the same time as the modifications) emissions decreases were obtained (for NO_x) due to the installation of low- NO_x technologies. These emissions decreases were, of course, accounted for in the calculations.

because they are consistent with regulatory requirements and because they would have indicated to Duke the likelihood of triggering PSD. Had there been inconsistent conclusions from these tests, more evaluations may have been performed and the need for consultation with regulators may have been identified. Specifically, the following three comparisons should have been performed for assessment of PSD applicability.

A. Generally (and certainly for modifications which did not qualify for WEPCO either because they undertaken prior to the July 1992 WEPCO decision or because the North Carolina SIP at the time of the modification did not contain the WEPCO provision, as discussed in Section IV.2). the actual-to-potential test using a prior 24 month baseline for non-WEPCO Rule modifications or highest 24 month out of the prior 60 months on an emissions basis for WEPCO Rule modifications (Comparison Test 1 discussed above) should have been done to assess regulatory applicability. Even if the WEPCO Rule could have applied the use of this test is not precluded. As discussed earlier, although utilities were allowed to use the "actual to future actual" test under the WEPCO Rule, they could only do so if they also submitted annual actual emissions or utilization data for 5 years after the change. This data would have confirmed Duke's initial projections of an emissions decrease after a non-routine change, Duke has not submitted such data for this purpose to the relevant agencies (i.e., North Carolina state regulators or EPA). Therefore, I have considered this test for all of the alleged modifications.

B. The company's own projections of the benefit or goal of the modification in terms of increased capacity projection (and generation) could have been used to estimate future emissions. Thus, Comparison Test 2 discussed above could have been directly used to initially estimate the increases in pollutant emissions caused by with a particular modification.

C. Finally, particularly for the time periods when WEPCO applied, Comparison Test 3 should have been performed, for several reasons. First, GADS activity factor data was readily accessible to Duke since they were in fact reporting the GADS performance and event data to the North American Electric Reliability Council (NERC). Second, the direct relationship of GADS activity factor data to the modifications, and their relevance and usefulness as a predictor of future availability and utilization, further enhances the utility of GADS data for identifying the effect of a modification on emissions. From that standpoint, the GADS data provide an excellent set of activity factors directly relevant to the causal aspects of the modifications[40] in so far as future emissions predictability

[40] NSR generally does not apply unless there is a causal link between the modification and the post-modification emissions increase (see WEPCO Final Rule, July 1992, Section C). For example, as stated in the July 21, 1992 WEPCO Final Rule Section C. " . . . where increased operations are in response to independent factors, such as system-wide demand growth, which would have occurred and affected the unit's operations even in the absence of the physical or operational change, such increases . . . shall be excluded from the projection of future actual emissions." As a general matter, given the nature and extent of the changes, at the various Duke units the projected growth in capacity utilization could not have been possible but for the physical changes alleged in the present proceedings. Hence, all emissions that were causally linked to modifications were considered. The GADS based comparison test is particularly useful in establishing this causal link.

is concerned. And, finally, Duke itself was using GADS data for the purposes of calculating emissions and making PSD applicability determinations[41]. While GADS is not explicitly referenced in EPA's PSD regulations, those regulations do not disallow its use either. PSD regulations apply to all industries and these industries have different measures of activity factors. Because it is not possible for the regulations or for regulatory guidance to anticipate all of the types of process data or activity factors from all industries that might conceivably be used as a basis for emissions calculations, there is no reason to believe that the use of GADS data would have been disfavored by any state agency or EPA.

The emissions comparison results, for each modification, of each test discussed above, is shown in the Table below. Attachments F and G, respectively, show the summary results and the detailed calculations for each test for each modification. In addition to the table below and the calculations in Attachments G, I have also provided an example of the types of graphs that can be generated from the data (baseline actual, future projected, and potential to emit) shown in Appendix G. The example, in Figure 1, is for SO_2 emissions from Dan River Unit 3.

[41] See, for example, memo in Bates 30B5E 0000002, dated 5/23/97.

Table 1 – Summary Emissions Increase Results (Tons/Yr) for PSD Applicability

Modification/ Comparison Test	Pollutant[1]			
	SO_2	NO_x	PM	PM_{10}[2]
PSD Significant Emissions Rate (SER)	*40*	*40*	*25*	*15*
Modification #6 – Allen 1 (1989)				
Comparison Test 1	11496.5	4538.1	1527.7	1023.6
Comparison Test 2	3430.4	1857.1	620.3	415.6
Comparison Test 3	55.7	30.1	10.1	6.8
Modification #5 – Allen 2 (1988)				
Comparison Test 1	12559.4	4957.7	2782.4	1864.2
Comparison Test 2	2991.6	1610.3	690.1	462.4
Comparison Test 3	34.2	17.7	6.8	4.6
Modification #23 – Allen 3 (1994)				
Comparison Test 1	15845.6	2377.0	1468.4	983.8
Comparison Test 2	1705.0	–	237.4	158.58
Comparison Test 3	21.5	5.6	1.6	1.1
Modification #3 – Allen 4 (1996)				
Comparison Test 1	13594.2	2235.0	773.4	518.2
Comparison Test 2	260.1	–	–	–
Comparison Test 3	195.3	65.0	11.3	7.6
Modification #4 – Allen 4 (1996)				
Comparison Test 1	11124.6	2751.0	1330.3	891.3
Comparison Test 2	2114.6	872.9	597.0	400.0
Comparison Test 3	150.3	60.6	14.5	9.7
Modification #2 – Allen 5 (1996)				
Comparison Test 1	14294.1	2210.9	1718.2	1151.2
Comparison Test 2	3324.4	191.2	408.7	273.8
Comparison Test 3	234.3	79.4	27.8	18.6

Modification #1 – Allen 5 (2000)				
Comparison Test 1	8153.1	2395.1	–	–
Comparison Test 2	880.0	481.3	–	–
Comparison Test 3	229.7	89.0	10.0	6.7
Modification #9 – Belews Creek 1 (2000)				
Comparison Test 1	14909.3	–	–	–
Comparison Test 2	–	–	–	–
Comparison Test 3	1319.8	537.2	35.5	23.8
Modification #8 – Belews Creek 2 (1996)				
Comparison Test 1	33644.4	22678.3	1077.5	721.9
Comparison Test 2[3]	–	–	–	–
Comparison Test 3	202.0	222.5	8.7	5.8
Modification #7 – Belews Creek 2 (1999)				
Comparison Test 1	15719.2	–	–	–
Comparison Test 2[4]	–	–	–	–
Comparison Test 3	331.3	147.3	11.0	7.4
Modification #12 – Buck 3 (1994)				
Comparison Test 1	6208.8	3063.6	369.4	247.5
Comparison Test 2	873.4	278.7	44.6	29.9
Comparison Test 3	0.0	0.0	0.0	0.0
Modification #11 – Buck 4 (1994)				
Comparison Test 1	2981.3	1471.0	169.3	113.4
Comparison Test 2	827.3	264.0	36.7	24.6
Comparison Test 3	4.8	2.4	0.2	0.1
Modification #10 – Buck 5 (1991)				
Comparison Test 1	9767.9	3855.8	387.1	259.4
Comparison Test 2	2415.9	1223.9	87.8	58.8
Comparison Test 3	97.7	49.5	3.6	2.4

Modification #28 – Buck 6 (1990)				
Comparison Test 1	9678.2	3179.8	249.5	167.2
Comparison Test 2	361.1	356.3	2.1	1.4
Comparison Test 3	50.0	33.2	2.0	1.3
Modification #21 – Cliffside 1 (1993)				
Comparison Test 1	6267.9	2249.2	503.8	337.5
Comparison Test 2	528.8	272.2	51.4	34.4
Comparison Test 3	2.7	1.4	0.3	0.2
Modification #17 – Cliffside 2 (1993)				
Comparison Test 1	5468.3	2158.5	759.8	509.1
Comparison Test 2	641.1	308.3	108.6	72.8
Comparison Test 3	0.0	0.0	0.0	0.0
Modification #18 – Cliffside 3 (1991)				
Comparison Test 1	9183.8	3295.6	862.2	577.7
Comparison Test 2	960.4	429.2	110.7	74.2
Comparison Test 3	45.2	20.2	5.2	3.5
Modification #19 – Cliffside 4 (1991)				
Comparison Test 1	6525.7	2341.8	637.5	427.1
Comparison Test 2	771.9	395.3	89.1	59.7
Comparison Test 3	5.7	2.9	0.7	0.5
Modification #20 – Cliffside 5 (1992) [4]				
Comparison Test 1	30934.4	10164.1	1339.1	897.2
Comparison Test 2	10339.1	4394.2	53.1	35.6
Comparison Test 3 [4]	0.0	0.0	0.0	0.0
Modification #20 – Cliffside 5 (1995) [4]				
Comparison Test 1	24077.8	3098.8	2496.1	1672.4
Comparison Test 2	5687.6	2464.6	–	–
Comparison Test 3	177.7	48.3	14.1	9.4

Modification #22 – Dan River 3 (1998)				
Comparison Test 1	10755.8	4245.7	609.7	408.5
Comparison Test 2	2160.0	1065.8	147.3	98.7
Comparison Test 3	617.9	304.9	51.2	34.3
Modification #29 – Marshall 1 (1992)				
Comparison Test 1	14217.7	4581.1	272.5	182.6
Comparison Test 2	4067.5	1491.3	–	–
Comparison Test 3	212.9	83.3	8.4	5.6
Modification #15 – Marshall 2 (1989)				
Comparison Test 1	14146.0	4456.2	1198.9	803.3
Comparison Test 2	2690.8	1091.9	42.3	28.3
Comparison Test 3	873.2	358.1	62.2	41.7
Modification #16 – Marshall 2 (1996)				
Comparison Test 1	10356.4	373.6	1673.7	1121.4
Comparison Test 2	5233.8	–	924.8	619.6
Comparison Test 3	131.3	37.0	9.1	6.1
Modification #14 – Marshall 3 (1999)				
Comparison Test 1	19530.2	4107.9	466.4	312.5
Comparison Test 2	502.2	188.3	88.4	59.2
Comparison Test 3	793.7	280.9	19.5	13.4
Modification #13 – Marshall 4 (1990)				
Comparison Test 1	22399.4	7166.8	2569.2	1721.4
Comparison Test 2	7347.2	2897.7	942.2	631.3
Comparison Test 3	1299.7	518.2	113.4	76.0
Modification #24 – Lee 3 (1989/90)				
Comparison Test 1	9861.7	3387.2	227.5	152.4
Comparison Test 2	488.2	380.9	17.5	11.7
Comparison Test 3	162.8	78.7	4.6	3.1

Modification #25 – Riverbend 4 (1990)				
Comparison Test 1	8691.3	2859.0	137.8	92.3
Comparison Test 2	1582.2	715.6	35.6	23.9
Comparison Test 3	93.6	42.3	2.1	1.4
Modification #26 – Riverbend 6 (1991)				
Comparison Test 1	15395.7	5064.4	482.9	323.5
Comparison Test 2	2066.9	1247.2	102.0	68.3
Comparison Test 3	312.7	188.7	15.4	10.3
Modification #27 – Riverbend 7 (1992)				
Comparison Test 1	10678.6	3512.7	340.1	227.9
Comparison Test 2	4215.2	1650.1	136.7	91.6
Comparison Test 3	313.1	122.6	10.2	6.8

Notes:

[1] "–" denotes a negative value or reduction in the comparison for that case. In many such cases, the NO_x comparisons show a reduction because of the installation or planned installation of low-NO_x technologies at that unit that were factored into the calculations of future projected NO_x emissions. PM emissions were somewhat erratic given the significant variability in the annual PM source test results that were used in the calculations.

[2] PM10 was estimated as 67% of PM emissions, per AP-42. Table 1.1-6.

[3] For this modification, it should be noted that its capacity factor in the baseline year as well as in the projection years was generally high given that it is a base loaded unit. For example its baseline year capacity factor was around 73% while its average post-mod year 1/2 and year 9/10 capacity factor projections were 76% and 78.5%, respectively. Even though there is a capacity factor increase, there appears to be a reduction in the projected

SO_2 emissions in the projected years as compared to the baseline period because the sulfur content in the coal in the baseline period (i.e., 24 month period with the highest SO_2 emissions for this potentially WEPCO Rule-eligible unit) was higher (i.e. 0.99%) than in the years preceding the modification (0.83%) and the latter was used to make the future projection, giving Duke the benefit of lower sulfur content in the future, even though this lower sulfur content is not enforceable via permits or other means. If, on the other hand, an average sulfur content for the entire 5 year period preceding the modification (0.89%) is used for all calculations (i.e., baseline actual and future projections, there would be an *increase* in Comparison Test 2 for this case.

[4] Although the complaint listed the modification as having occurred in 1992 and 1995, emissions calculations are provided for both 1992 and 1995 changes separately. The lack of GADS based losses attributable to the economizer prior to the 1992 modification (in which the economizer was replaced given its documented [see Bates 62CS001] poor performance in preceding years) needs further discussion. Closer inspection of the GADS data show that this base load, low heat rate (i.e., economically efficient) unit was not operating for a significant portion of time preceding the 1992 modification and was listed as being in reserve shutdown. It is possible that repairs to the malfunctioning economizer were made during periods of reserve shutdown and therefore such periods of time did not get attributed to the economizer repair.

VII. RESULTS OF EMISSIONS CALCULATIONS

The summary and detailed results of the various emission calculation approaches discussed above for PSD are provided in Attachments F and G for each of the modifications relevant to the present proceeding. All supporting documents used in the emissions calculations are referenced in the calculation tables in Attachment G.

VIII. CONCLUSIONS

Based on the foregoing analysis, and given the extensive nature of the modifications and/or change in the method of operation of the various Duke units that are the subject of this litigation, it is my opinion that Duke should have applied for and obtained PSD permits prior to undertaking the modifications and/or change of method of operation at its respective units.

Figure 1 - Dan River 3 (1988) - SO2 Graph

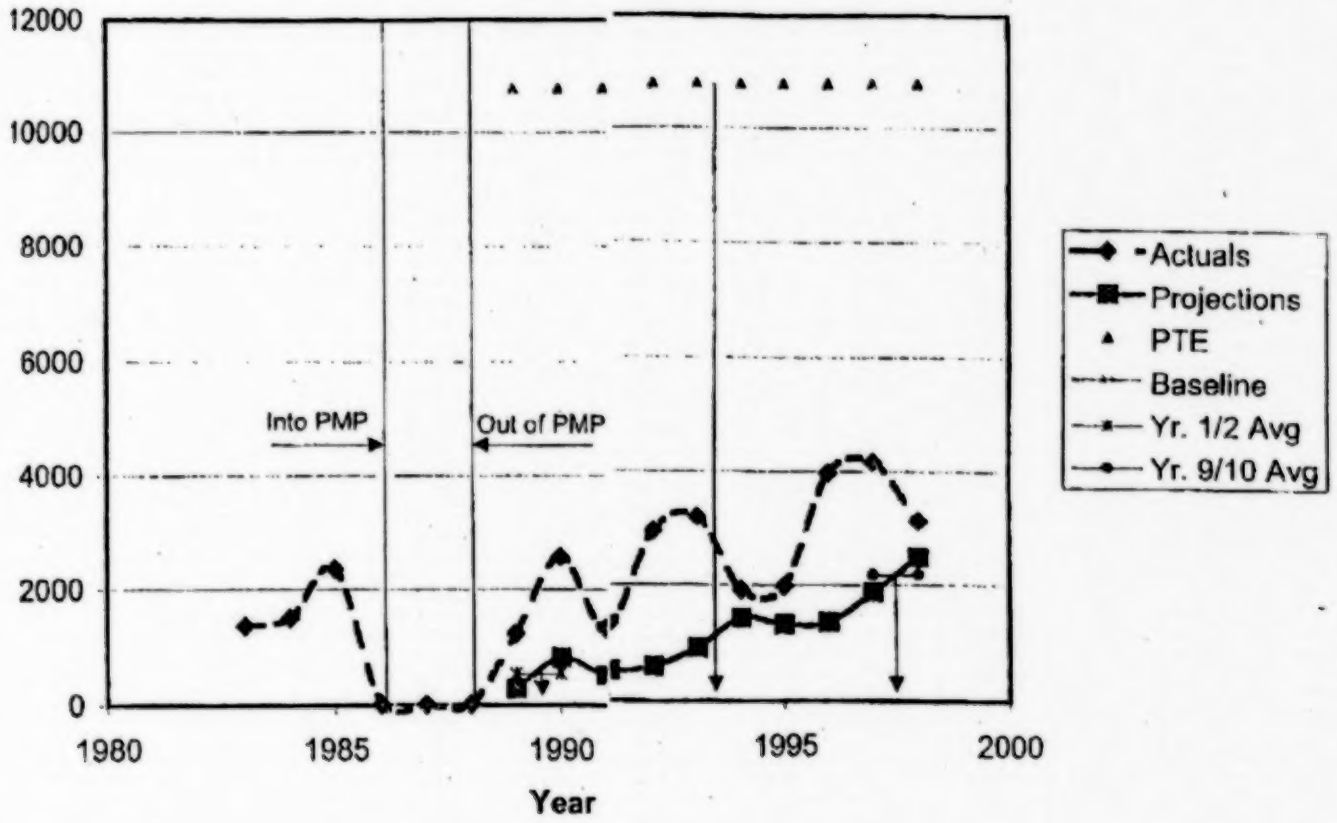

Figure 2 - Allen 5 (1996) - SO2 Graph

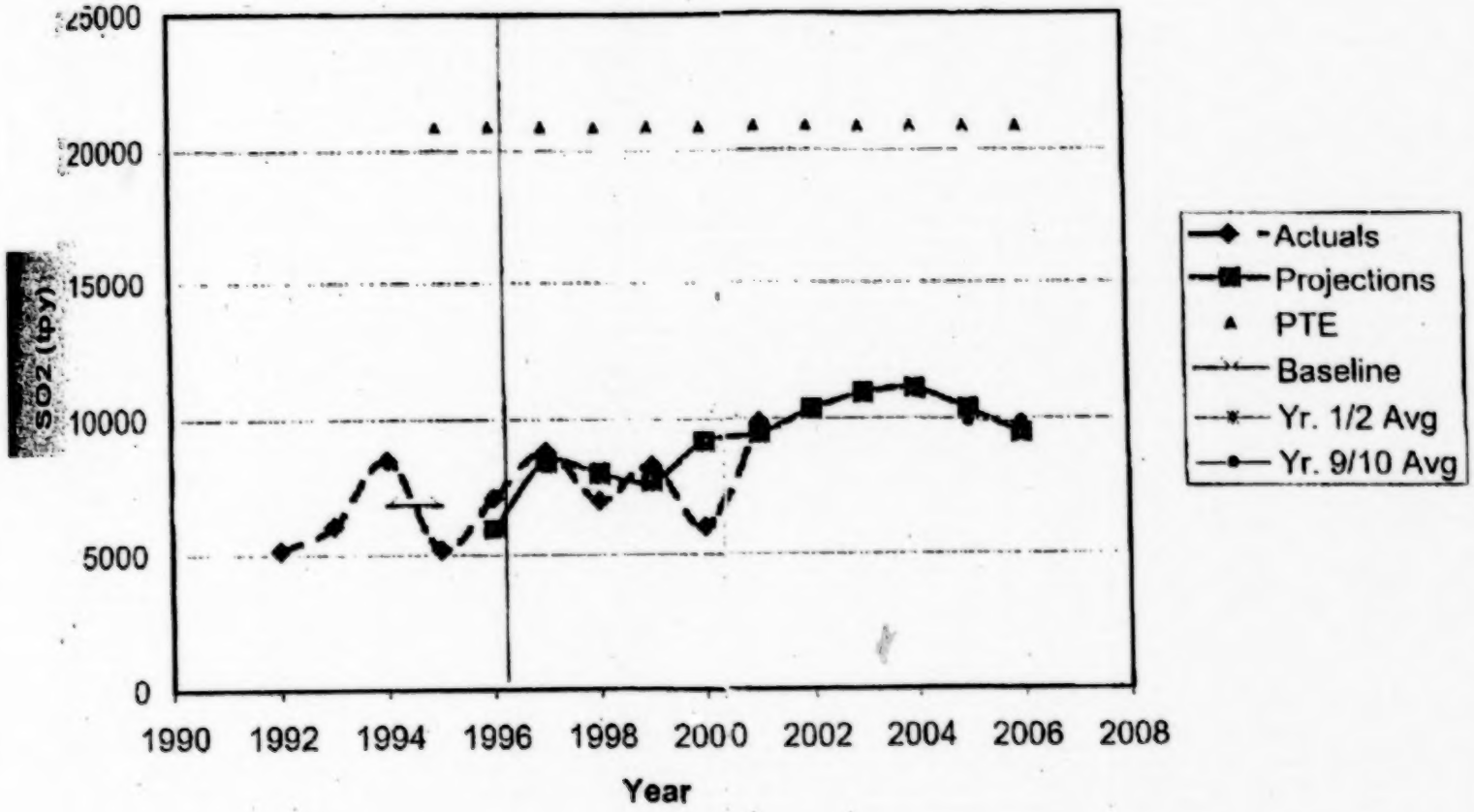

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EXHIBIT 162

BEFORE THE
UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY

Docket No. A-90-06

Statement of Henry V. Nickel, on behalf of the Utility Air Regulatory Group, on EPA's Proposed Rule on New Source Review and Confirmation of Existing Law

Introduction

My name is Henry V. Nickel. I am a partner with Hunton & Williams in Washington, D.C. I am appearing here today on behalf of the Utility Air Regulatory Group (UARG), an *ad hoc* organization of 71 individual electric utilities, as well as the three industry trade associations. Since 1970, I have represented clients, including UARG, in virtually every significant Clean Air Act rulemaking involving the regulation of major stationary sources. I also represented Wisconsin Electric Power Company in litigation before the U.S. Court of Appeals for the Seventh Circuit that culminated in the so-called "*WEPCo*" decision.

Before turning to the specifics of EPA's proposed rule, I would like to address two broader issues that UARG believes are important in assessing the proposed rule and its preamble in general.

First, as whole, the proposed rule and its preamble send a welcome signal to the electric utility industry that EPA has moved away from those interpretations of its New Source Review (NSR) rules – its so-called "WEPCo interpretations" – that have cast a considerable "cloud" over pollution control projects and other legitimate utility

activities at existing sources. In this regard, the proposed rule and preamble recognize that EPA's NSR provisions have *never* contemplated that every activity that would lead to an emission increase should trigger NSR. For instance, from their inception, the NSR rules have excluded whole categories of activities at existing sources, such as "routine maintenance, repair, and replacement," or emission increases resulting from increases in hours of operation or production rate. Generally, these exclusions apply to activities that would be expected to occur at existing sources during their useful life and therefore are consistent with their continued grandfathered status.

Second, and relatedly, the proposed rule should be viewed as giving effect to the plain meaning of existing law, not as an expression of new law. Indeed, in contrast to EPA's "WEPCo interpretations," the view of current law contained in the preamble to the proposed rule is in line with the agency's own historic understanding of its NSR rules.

Pollution Control Projects

Consistent with its original interpretation of the NSR rules, EPA's notice makes clear that most, if not all, pollution control projects are excluded from NSR. Only where EPA finds that a pollution control replacement project would make a unit "less environmentally beneficial" would NSR apply.

While we are pleased with EPA's decision to remove the *WEPCo* "cloud" that has threatened timely and successful efforts by the utility industry to meet the requirements of Title IV, we do not believe that, as a matter of law, *any* change in EPA's rules is necessary. Since the early

1970's, the New Source Performance Standards (NSPS) rules have excluded pollution control projects from the definition of "modification" unless the replacement of such pollution controls rendered the unit "less environmentally beneficial." In 1977, when the Clean Air Act was amended to include the NSR provisions, Congress provided that the term "modification" was to have the same meaning as under the NSPS program. Further, in 1983, EPA determined that environmentally beneficial pollution control projects are excluded from NSR. The interpretation of current law announced by EPA in its recent notice is consistent with the Act and the agency's earlier determination.

Thus, while we support the intent of EPA's proposed rule on pollution control projects generally, we do not believe that this rule is in fact needed. But if such a rule is to be adopted, it should not be restricted to pollution control projects in the electric utility industry. Such a restriction cannot be logically reconciled with the EPA's own understanding of its NSR rules or with Congress's intent in enacting the NSR program.

"Actual-to-Actual"

We support EPA's affirmation that the "linchpin" for deciding whether to use "future actual" or "future potential" emissions in calculating an emission increase is whether the unit has "begun normal operations." 56 Fed. Reg. 27,633 (June 14, 1991). EPA's NSR rules allow for the comparison of "past actual" emissions to "future potential" emissions only where a unit has "not begun normal operations." Where normal operations have begun, the "actual-to-actual" approach applies.

EPA strayed from the proper interpretation of its NSR rules with its so-called "WEPCo interpretations." EPA's notice constitutes a welcome return by the agency to the correct view of the law.

With respect to determining the pre-change baseline for making the "actual-to-actual" comparison, EPA notes that, historically, it has used the two years immediately preceding the proposed change to establish the baseline. While EPA proposes to retain the current regulatory language, it has announced a new presumption that "any 2 consecutive years within the 5 years prior to the proposed change is representative of normal source operations for a utility." 56 Fed. Reg. 27,636 (June 14, 1991). We believe that, in order to allow for the establishment of a truly "representative" baseline period, EPA should clarify its presumption to provide for the use of any two consecutive years within the last five years of *operations*. This would allow for the establishment of a more representative baseline for units that have been in a lengthy shutdown.

"Causal Link" Requirement

In its notice of proposed rulemaking, EPA points out that, under the plain language of its NSR provisions, the physical or operational change must "result in" an increase in actual emissions in order to consider the change a modification. Thus, EPA recognizes that emission increases must be causally linked to the physical or operational change. EPA continues that, where "increased operations are in response to independent factors, such as system-wide demand growth, which would have occurred and affected the unit's operation, such increases do not result from the change and shall be excluded from the

projection of future actual emissions." 56 Fed. Reg. 27,63 (June 14, 1991).

We agree with EPA's application of the causal lin requirement to utility operations. We note, moreover, tha excluding load growth from emission increase calculation at units that have begun normal operations is also re quired under the "production rate/hours of operation exclusion in 40 C.F.R. § 52.21(b) (2) (iii) (f).

Calculation of NSPS Baseline

We generally support EPA's proposal to amend it NSPS rules to use a five-year period prior to a physical o operational change in calculating the baseline for deter mining maximum hourly emissions. Again, EPA's propose change is consistent with past practice, since it recognize that, where temporarily lowered emissions immediatel before a physical or operational change are not representa tive of emissions after the change, such lowered emissio levels should not be used.

We believe, however, that EPA's rule should be clar fied to provide for the establishment of a baseline on th basis of the last five years of the unit's *operations*. Such change is necessary if the unit's baseline is truly to b "representative of [the unit's] physical and operationa capacity in recent years. . . . " 56 Fed. Reg. 27,638 (Jun 14, 1991). Also, we do not believe that there is any basi for EPA to restrict its proposed rule to electric utility unit only.

BACT Presumption for NOx Controls

We support EPA's proposal to adopt a presumption that "best available control technology" (BACT) for emission of nitrogen oxides (NOx) is low NOx burners or some similar cost-effective technology. We agree with EPA that this presumption is appropriate given the strong congressional policy judgment favoring the use of low NOx burners for NOx control at existing units under Title IV.

Effect on Local Air Quality

Contrary to some criticisms that have been leveled against EPA's proposed rule, we believe it important to recognize that the proposed rule does nothing to authorize increases in emissions that threaten local air quality. A source's obligation to meet ambient requirements is independent of any obligation to meet NSR requirements. That an increase in emissions is found not to be a modification does not in any way authorize the source to exceed Prevention of Significant Deterioration (PSD) increments, ambient standards, or a visibility related limitation. Nor would an increase in utilization of a unit be expected to threaten compliance with ambient requirements. Most if not all emission limitations implementing ambient standards or PSD increments are based on annual emission factors that represent operations 365 days a year at maximum production levels.

As already noted, EPA has never considered its NSR program as addressing every type of activity within industry that potentially increases emissions. Small sources are not covered by the NSR provisions. The rules themselves exclude from the modification definition a variety of activities that can result in emission increases.

For instance, emission increases attributable to increases in a unit's hours of operation or production rate (*i.e.*, annual utilization) are excluded. In this regard, in developing the Administration's proposal on acid rain legislation, EPA projected substantial increases in utilization of units over the next 10 years and predicated, at least in part, the need for a SO_2 cap on these projections. Any claims that increases in utilization of existing utility units are for the first time authorized by this notice (*i.e.*, were somehow prohibited before this notice) have no basis in fact or law.

Conclusion

We support EPA's decision to confirm and clarify existing law, which should further the efforts of the electric utility industry to meet the goals of Title IV in an effective and timely manner. UARG will be submitting more detailed written comments on the proposed rule by the end of the comment period.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	CIVIL NO. 1:00CV1262
DUKE ENERGY CORPORATION,	)	
Defendant.	)	

SUPPLEMENTAL EXHIBITS IN SUPPORT OF
DUKE'S MOTION FOR SUMMARY JUDGMENT

(Filed Mar. 31, 2003)

* * *

Report to the Public Staff
North Carolina Public Utilities Commission

The Duke Power Company's
Plant Modernization Program (PMP)
and Catawba Unit 2

Volume II: Analysis of Life Extension

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August 19, 1986

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* * *

1.5 SUMMARY OF FINDINGS

The results of our evaluations of the current status of th equipment at the PMP units, the current Plant Modern zation Program, the EUORs for the units and specifi alternate scenarios for the Plant Modernization Prograr are described in the subsequent sections of this report. Th overall findings of this work relative to answering the fou questions identified above in OBJECTIVES are as follows:

1. Although the individual PMP units are in need of repair and upgrade, the condition of the units would not preclude any of them from being operable, albeit at reduced reliability and, in some cases, with additional restrictions on maximum output or limited

start-stop cycles prior to completion of the upgrade work.

2. If, in late 1982/early 1983, Duke Power Company had initiated an aggressive program to upgrade these twelve PMP units, it would have been possible to have the upgrade work critical to reliable operation for Dan River 3, Riverbend 6, and Riverbend 7 completed in 1985 (408 MW); Allen 1 and Buck 5 completed in 1986 (278 MW); Buck 3, Buck 4, Cliffside 3, and Cliffside 4 in 1987 (230 MW); Allen 2, Cliffside 1, and Cliffside 2 in 1988 (226 MW). In order to achieve this aggressive program additional costs would be incurred due to the need to perform the work on a two shift basis using a significant amount of contract labor. The additional costs would amount to about $22 million.

3. The repairs and upgrades contained in Duke's PMP appear, in general, to be reasonable based upon the current condition of the units. There is greater uncertainty in the repairs and upgrades required on units for which a detailed upgrade study has yet to be performed (PMP units at Buck, Riverbend and Cliffside). The assumption in the Duke program that all 19 suspect turbine and generator rotors will require replacement at a cost of $72 million is highly conservative. Some of the rotors have not been inspected by boresonic tests and may be in good condition. Even with unfavorable boresonic tests, they may be repairable by overboring or bottle-boring. In the case of some of the smaller non-reheat units (particularly Buck 4 and Cliffside 1 and 2), the cost of rotor replacement may be prohibitive in relation to

the value of the units and if the rotors can not be repaired, it may be preferable to retire the units or to operate them with a frequent inspection cycle with limitations on the number of start-stop cycles prior to reinspection.

* * *

Operability of Units

All of the units in the current PMP could be made operable with modest expenditures and retained in an operable condition during the upgrade effort. In some cases, such as Allen 1 and 2, the maximum dependable capacity of the units would have to be reduced until the precipitators are replaced. In other cases, such as Buck 3 and 4, the number of start-stop cycles on the unit would have to be restricted until the turbine generator rotors are repaired or replaced. In most units, the reliability and heat rate of the units would be significantly degraded until the upgrade work is performed.

Faced with the current situation of not needing the units to meet system load and with Catawba 2 coming on-line in 1986, placing the units in an extended cold shutdown condition can be cost effective since operations and maintenance costs can be reduced and upgrade work can be performed as maintenance personnel are available.

Replacement of Rotors

The assumption that all turbine and generator rotors that have not been verified to be in good condition using boresonic techniques require replacement is highly conservative. The program calls for the replacement of 19 rotors at a total cost of $72 million (See Table II-2.5) which is 45%

of the total cost of the total upgrade program at these twelve units. Ten of these rotors have not been boresonically tested and it is not known if any serious indications are present. One might suspect some level of indications of cracks in the rotor material due to the age and service conditions (cycling) to which these rotors have been subjected. Bottle-boring and overboring has been successful in many instances in removing the bore indication yielding a rotor which should be serviceable for an additional 20-year life. The Dan River 1 and 2 generator rotors, the Dan River 2 LP turbine rotor, the Cliffside 3 LP rotor and the Cliffside 4 HP rotors have been successfully overbored or bottle-bored to remove indications. Overboring of the Cliffside 4 LP rotor should remove any indications. Duke feels there is some chance of saving the Buck 3 generator rotor and the Riverbend 6 IP/LP rotor. Although it is not possible to say how many of the 19 rotors can be saved, it is very conservative to assume that all will require replacement.

* * *

EXHIBIT 129

[LOGO] UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 28 1983

OFFICE OF
AIR, NOISE AND RADIATION

SUBJECT: Bridgeport Harbor Coal Conversion

FROM: Director
Stationary Source Compliance Division
Office of Air Quality Planning and Standards

TO: Harley Laing, Director
Air Management Division, Region I

This is in response to your June 8, 1983 request for an applicability determination concerning the conversion to coal of Bridgeport Harbor Unit #3. Your opinion is that the conversion should not be subject to either PSD or NSPS requirements because you feel the boiler was originally designed to burn coal, and as such is exempt under § 60.14(e)(4) from NSPS coverage and under § 52.21(b)(2)(iii)(e)(1) from PSD coverage. You asked for our concurrence in this opinion.

United Illuminating Company (UI) wants to burn coal in its 400 MW capacity Bridgeport Harbor Unit #3 (it currently burns oil) and requests your determination that such a conversion is exempt from NSPS and PSD applicability. UI contends that the unit was originally designed to accommodate coal, and has supplied copies of the original proposal, contract and designs to support this position. Even though a decision was made in 1967, during the latter stages of construction, to use oil as the primary fuel, no coal-firing equipment was deleted from the contract

and all equipment contracted for was installed. Additionally, coal handling facilities, pulverizers, ash and slag handling equipment and all other systems and equipment required for pulverized coal firing of the unit were installed.

Since coal was never burned in the unit, changes are now necessary to enable its use. Such changes include modifications to tubing within the boiler, the addition of flame scanners, burners, ignitors and relays, and piping and wiring to allow for bottom ash removal. In addition, the pulverizers must be made functional. These changes to the steam generating unit are estimated to cost approximately 5 million dollars.

The NSPS for electric utility steam generating units, 40 CFR 60, Subpart Da, provides an exemption from coverage for conversion from oil to coal. See §60.40a(d):

> Any changes to an existing steam generating unit originally designed to fire gaseous or liquid fossil fuels to accommodate the use of any other fuel (fossil or nonfossil) shall not bring that unit under the applicability of this subpart.

A less inclusive provision exempts coal conversions from Subpart D NSPS applicability if the existing facility was designed to accommodate coal before August 18, 1971. See §60.14(e)(4), which exempts from the modification provisions:

> Use of an alternative fuel or raw material if, prior to the date any standard under this part becomes applicable to that source type, the existing facility was designed to accommodate that alternative use. A facility shall be considered to be designed to accommodate an alternative fuel or

raw material if that use could be accomplished under the facility's construction specifications as amended prior to the change.

Bridgeport Harbor Unit #3 is exempt from Subpart D coverage because of the provision at §60.40a(d). My staff has examined the conversion as related to Subpart D applicability, and discussed it with EPA's Emission Standards and Engineering Division (ESED). The construction specifications for unit #3 outlined in your memorandum clearly indicate that the unit was designed to accommodate coal prior to the Subpart D applicability date, even though coal was never burned. Also, the approximately million dollars which UI must spend on the affected facility, the steam generating unit, to enable it to actually burn coal, is minimal compared to the costs of a coal conversion, and represents only minor adjustments to equipment already in place. For these reasons, both SSCB and ESED concur with your conclusion that Unit #3 is exempt from coverage under Subpart D as well as Subpart Da.

The question of PSD applicability is more difficult because it is necessary to determine if the entire plant rather than simply the boiler, was capable of accommodating coal before the January 6, 1975 applicability date. In a telephone conversation on July 19 1983 between Robert Myers of my staff and John Courcier of your office, John related to Bob the extent to which UI has incorporated coal capability at their Bridgeport Harbor Station. Apparently UI has already put in place, prior to January 6 1975, all of the coal handling and support facilities necessary for the combustion of coal. This equipment continues to be available and only requires some minor adjustment in order to accommodate coal at Unit #3. Therefore, it is

the opinion of this office that UI's Bridgeport Harbor Station was capable of accommodating the alternative fuel prior to January 6, 1975, and is exempt from the PSD permitting requirements pursuant to §52.21(b)(2)(iii)(e)(1).

This response has received the concurrence of both OAQPS and the Office of General Counsel. Please contact Robert Myers at FTS 382-2875 if you have additional concerns.

/s/ Edward Reich
Edward E. Reich

cc: Jack Farmer
Walt Stevenson
Earl Salo
Dave Rochlin
Mike Trutna
Peter Wyckoff

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

DATE: June 8, 1983

SUBJECT: PSD Applicability for Bridgeport Harbor Coal Conversion

FROM Harley F. Laing, Director /HL/
Air Management Division Region I

TO Edward E. Reich, Director
Division of Stationary Source Enforcement

Issue

Region I requests your concurrence in our determination that the Bridgeport Harbor Unit #3 is not subject to either PSD or NSPS requirements. It is our belief that the boiler

was originally designed to burn coal and the changes that are being under-taken at UI's Bridgeport Harbor station do not constitute a major modification as defined under PSD and NSPS, and therefore, should be exempt from these reviews.

Background

The United Illuminating Company (UI) has filed an application with the Connecticut Department of Environmental Protection (CT DEP) to burn coal in Unit #3 (BHS 3) at UI's Bridgeport Harbor Station. The CT DEP issued UI an operating permit for BHS 3, and has since requested that Region I determine whether or not the coal conversion at BHS 3 (which was originally designed to burn coal) should be considered a modification and therefore subject to the PSD and/or the NSPS regulations (40 CFR Part 60, Subparts D and Da).

UI contends that BHS 3 was originally designed to accommodate coal. In fact, they have supplied the CT DEP with copies of the original proposal, contract, and designs which indicate that coal was indeed intended to be the primary fuel. During the latter stages of the construction in 1967-1968, a decision was made to use oil as the primary fuel and coal as a secondary fuel. However, no coal firing equipment was deleted from the contract and all coal firing equipment contracted for was installed. In addition, all of the other systems and equipment required for pulverized coal firing of the unit, including coal handling facilities, pulverizers and ash and slag handling equipment, were similarly specified by UI and installed by UI's contractor.

At a state investigative hearing on the coal conversion, certain additional facts were revealed. Although UI showed that the boiler was originally designed and built to burn either coal or oil, significant heat exchange surface alterations were made to allow for continuous, long-term oil burning. Coal has never been burned in the BHS 3. Some modifications to BHS 3 are now necessary in order to allow for continuous, reliable coal burning at partial load or oil at full load, including modifications to tubing within the boiler, as well as to some of the auxiliary equipment. Other changes to the unit include the addition of flame scanners, burners and ignitors, and additional relays. Certain piping and wiring to allow the bottom ash removal system, certain coal handling equipment and the pulverizers to be functional is also necessary. Additional equipment modification would have been necessary in 1968 to burn coal, but because oil was to be used as fuel, such modifications were never fully completed. Although the state hearing officer concluded that extensive "physical changes and additions" to the BHS 3 totalling some $35 million constitute a modification to a stationary source, the CT DEP did not require UI to obtain a modified source permit for BHS 3. The state did, however require UI to obtain an operating permit to convert to coal.

Rationale

NSPS (Subpart D): 40 CFR 60.14(e)(4) exempts a change to a facility (in this case, a boiler) from consideration as a modification if the emissions increase from such change results from use of an alternative fuel, provided the use of the alternative fuel could be accommodate under the facility's construction specifications as amended prior to the change. UI's designs for BHS 3, as well as their

contract, specified all equipment necessary for burning coal as the primary fuel.

All major equipment was installed. It is Region I's opinion that the alterations to the boiler necessary to burn coal presently result from the 1968 alterations to the boiler that were made to enable the boiler to burn oil, and as such do not constitute a modification.

NSPS (Subpart Da): 40 CFR 60.40a(d) exempts an oil burning unit from the provisions of Subpart Da if such unit is modified to burn coal.

PSD: 40 CFR 52.21(b)(2)(iii)(e)(1) exempts a change to a source (in this case, the generating station) from consideration as a major modification if such change results from the use of an alternative fuel, provided the source could accommodate the alternative fuel prior to January 6, 1975. BHS 3 was built before this date and was designed to burn coal, and is therefore exempt from PSD. If your office concurs with Region I's determination, please advise us by June 24, 1983. If your office does not concur, please forward your determination by July 8, 1983.

Since several parties are anxiously awaiting this determination we would appreciate your response by the dates indicated above.

If you should have any questions, or should need additional information, please contact John Courcier (FTS 223-5137) of my staff.

cc: Rich Biondi, DSSE
Marcus McCraven, UI
Leonard Bruckman, CT DEP
Mike Trutna, QAQPS

EXHIBIT E

CAPITAL COST ESTIMATE

(1982 Dollars)

	Total Project Cost (in thousands)
Coal Handling	$ 921
Coal Pile	418
Dust Suppression	1,256
Fire Protection	1,159
Boiler	4,443
Bottom Ash System	4,256
Econ. Ash Removal	422
Precipitator	4,487
Precipitator Ash System	2,590
Electrical	3,342
Controls	472
Computer	484
OSHA & Safety	1,100
Blr., Econ. & A.H. Wash	85
Waste Water	242
Sort Facilities	2,474
Site Improvements	341
Ash Management	623
O&M Training	1,940
Owner's Cost	1,725
Legal	120
Permits	152
Consultants	406
Spare Parts Inventory	1,293
TOTAL	$34,751

Attachment 2
6/29/83

ENVIRONMENTAL CONTROLS:		
Coal Pile	$ 418,000	
Dust Suppression	1,256,000	
Bottom Ash	4,256,000	
Econ. Ash Removal	422,000	
Precipitator	4,487,000	
Precipitator Ash System	2,590,000	
Controls	472,000	
Waste Water	242,000	
Ash Management	623,000	
		$14,766,000
MISCELLANEOUS SUPPORT ITEMS:		
Support Facilities (Building to house Personnel & Computer)	$2,474,000	
Site Improvement	341,000	
O & M Training	1,340,000	
Owner's Cost (UI Engr.)	1,725,000	
Legal	120,000	
Permits	152,000	
Consultant	406,000	
Spare Parts	1,293,000	
Fire Protection	1,159,000	
OSHA	1,100,000	
Coal Handling	921,000	
Electrical	3,342,000	
Computer	484,000	
		$15,457,000
Boiler	$4,443,000	
Blr., Econ. Air Heater Wash	85,000	
		$ 4,528,000
TOTAL ESTIMATED COST AT TIME OF FILING		$34,751,000

EXHIBIT 138

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA, Plaintiff,	:	
ENVIRONMENTAL DEFENSE, NORTH CAROLINA SIERRA CLUB, NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP Plaintiff-Intervenors	:	Civil Action No. 1:00 CV 1262
v.	:	
DUKE ENERGY CORPORATION, Defendant.	:	

Washington, D.C.

Monday, November 25, 2002

Videotaped deposition of RANAJIT SAHU, a witness herein, called for examination by counsel for Defendant Duke Energy Corporation in the above-entitled matter, pursuant to notice, the witness being duly sworn by MARY GRACE CASTLEBERRY, a Notary Public in and for the District of Columbia, taken at the offices of U.S. Department of Justice, 1425 New York Avenue, N.W., Washington, D.C. at 9:22 a.m., Monday, November 25, 2002, and

the proceedings being taken down by Stenotype by MARY GRACE CASTLEBERRY, RPR, and

* * *

[463] Q. Mr. Sahli, if I told you that there is a project at a 70 megawatt unit that involved the replacement of the lower economizer bank, a large portion of the drum circuit, all of the feed water heaters and all of the condensate and heater drain pumps and this project was done in, let's say the mid-'80s.

A. Okay.

Q. Do you have an opinion about whether a PSD permit would be required for such a project?

A. No, not just by what I heard.

Q. What do you need to hear more?

A. Well, I mean people have to determine if it is excludable or not, some of these physical changes. Looks like physical changes were made. That's about all I can ascertain from your –

Q. And I described the physical changes to you. Let's take them step by step. In your opinion, are these physical changes that I described to you or actually these replacements that I described to you, [464] in your opinion, are they excludable?

A. Again, I'm not here to opine about routine repairs so –

Q. I understand. I still would like to have your opinion.

A. Would you run those by me again?

Q. Sure. Replacement of the lower economizer bank, a large portion of the drum circuit, all of the feed water heaters and all of the condensate and heater drain pumps.

A. They seem like major changes.

Q. So in your opinion, that would be not excluded?

A. Right.

Q. So those would be a physical change?

A. That would be a physical change, in my opinion.

Q. And to determine whether there was an emission increase for such a project, what test would you apply in 1985?

A. An actual to potential test.

Q. And what test would you apply in 1989?

A. 1989, you said? I would apply an actual to potential test.

Q. What test would you apply in 1991?

[465] A. I believe I would still apply an actual to potential test.

Q. And if you knew that no emissions control were put on that unit and you're not aware of any permit limitations that required a curtailment of hours of operation, is it reasonable to assume, based on the information that you have, that this project would have triggered PSD?

A. Is this a coal fired unit?

Q. It's a coal fired unit.

A. Is it burning low sulfur coal, high sulfur coal?

Q. Let's start with low sulfur coal.

A. Does it have an ESP? I don't know what the unit has or doesn't have.

Q. It's a 70 megawatt unit in the mid-1980s It's likely to have an ESP, its not likely to have any NOx controls.

A. Correct.

Q. And it's not likely to have any SO2 controls. It's pre-NSPS unit.

A. Okay.

* * *

EXHIBIT 143

ENVIRONMENTAL PROTECTION AGENCY

FEB 13 1978

MEMORANDUM

SUBJECT: MAYTEP, Determination of Applicability

FROM: Director
Division of Stationary Source Enforcement

TO: Thomas W. Devine, Chief
Air Branch – Region I

This office has reviewed your determination of applicability of the PSD regulations to MAYTEP. Our comments are as follows:

1. The discussion in item 1 leads me to the conclusion that MAYTEP would not be subject to the revised NSPS for steam generators. This definition is only a part of draft regulations and in no way should be relied upon for any action taken by the Agency. Further, exclusion from NSPS does not indicate that the source should not be subject to PSD. NSPS are technology based standards developed for very specific source categories. PSD source categories, on the other hand, must be considered as broadly as possible since our objective is to protect air quality to the maximum degree. Rather than relying on a draft regulation, we should consider the PSD proposal (11/3/77) which includes an expanded list of source categories and a 250 tons/year potential emission catch-all. It seems reasonable to me that any determination made should move closer to the intent of Congress, instead of moving further from it.

2. We believe entirely too much reliance is made upon the NSPS. The mere fact that a source is or is not

covered by NSPS should not be the overriding factor when determining applicability to the PSD requirements. Since this source will emit approximately the same amount of pollution as one that was designed to produce 100% electricity, it makes no sense to me to exclude it from a review which is concerned with those emissions and their effect on ambient air quality.

3. Your decision that the source category "steam electric plants of more than 1000 x 10^6 BTU/hr heat input" was chosen to cover only large steam electric power plants and not steam generating units is false and is not founded by any previous Agency actions. The Agency has always held that the source categories should be interpreted as comprehensively as possible in order to preserve the spirit and intent of the regulations.

4. Your discussion in item #4 is not very convincing when the main consideration should be air pollution and its effect on air quality. Neither the owner of the source of the emissions nor the source's use should play any role when considering its applicability.

5. What occurs as a result of an action taken by another program (effluent guidelines) should not be a controlling factor within the air program particularly if the definition is contrary to the one already in use.

6. Your discussion in item #6 may be correct, but since we are implementing a regulation that exists now, we cannot predict what my occur sometime in the future, nor can we base our decision on some future regulatory exemption which can only be triggered by what amounts to a political decision.

7. That there will be no environmental benefit realized by including this source in the PSD regulations, should not affect EPA's decision of whether or not to cover this source. The precedent this establishes could prove to be very damaging when attempting to implement the PSD requirements with similar sources. In addition similar sources which may have already complied with these requirements may now object to their applicability based on this decision.

In summary, it is the opinion of this office that MAYTEP qualifies as a 1000 million BTU/hr heat input fossil fuel steam electric plant and that it is subject to the PSD requirements. Further, it is the function of DSSE to provide guidance for interpretations which address the implementation of these regulations. Reliance upon opinions obtained from other EPA offices without consulting DSSE will not ensure uniform national policy for implementation of these regulations. Agency policy requires that DSSE, after consulting with other EPA offices, make the final recommendation for interpretation of these requirements.

If you have any comments or questions, please contact Rich Biondi (755-2564) of my staff.

Edward E. Reich

cc: Mike Trutna – CPDD
Dick Rhoads – CPDD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

DATE: JANUARY 6, 1978

SUBJECT: MATEP, Determination of PSD Applicability

FROM: Thomas W. Devine, Chief

The Files

The following evaluation is based on the information available to Region I as of this date (December 20, 1977). This information was supplied by the Commonwealth of Massachusetts and United Engineers and Contractors (principle consultant for MATEP). It is the Agency's determination that this facility is not subject to the present significant deterioration regulations which remain in effect until March 1. If the facility receives all required permits from the state prior to March 1, 1978 and since it has already begun the construction under an earlier state permit it will not be subject to significant deterioration requirements in effect after March 1, 1978. If the necessary permits are not issued, the source would be subject to PSD regulations as proposed in the *Federal Register* at this time.

Following is the basis for this determination:

1. The proposed Standards of Performance for New Stationary Sources which is expected to be in the Federal Register prior to February 1, 1978 constitutes a partial revision to 40 CFR Part 60, Subpart D. Electric utility power plants are now defined as any facility where more than one-third of the steam generated is ultimately used to produce electric power for sale. MATEP would not be included in this category as only 20 to 25% of the steam

generated is used to ultimately produce electric power and the distribution of that power would not be included in the definition of "for sale".

2. Sources which would not be included under the above definition would remain covered under 40 CFR Part 60, Subpart D and in the proposed revision are identified as industrial facilities that produce electric power or steam for their own use or that sell less than one third of their electrical steam generating capacity. This facility cannot be construed as being an industrial facility. The remaining section under 40 CFR Part 60.40 is applicable to any fossil fuel fired steam generating unit assuming that that definition would not be further redefined by the proposal. This facility is subject to New Source Performance Standards under this definition and has been reviewed on that basis by the state and conforms with standard requirements. (It also would meet all presently applicable PSD requirements.)

3. The only type of stationary source included within the present significant deterioration regulations which this source might fall under would be fossil fuel *steam electric* plants of more than 1000 x 10^5 BTU/hour heat input. This specifically identified source category is different from the NSPS source category referred to above. This category was chosen to cover large steam electric power plants not steam generating units. The Agency's choice of the 19 major source categories to be covered by the presently applicable PSD requirements has been upheld in court with the recognition that they were deliberately limiting.

4. MATEP is incorporated under Chapter 121A of the Massachusetts General Laws and as such is a non-profit

corporation. MASCO, also a non-profit corporation, will operate the facility and distribute power to its members. MATEP will be reimbursed by those members based on use to defray operating and amortization costs. The only distribution outside of the MASCO membership will be to the Mission Hill Housing project which is owned by Harvard University (a member of MASCO). The project will not receive any power, only steam and chilled water. As a non-profit organization which is not selling anything this facility would not be included within the definition of utility or industrial under the proposed NSPS revision for el ctric utility steam generating units.

5. This determination is also consistent with the definition under "Effluent Guidelines", the standards for the NPDES program (40 CFR 423.1, Steam Electric Power Generating Point Source Category) which define applicability as being limited "to discharges resulting from the operation of a generating unit by an establishment primarily engaged in the generation of electricity for distribution and sale". This constitutes an Agency interpretation of "steam electric", and this definition would not include a source like the MATEP facility, since it is not primarily engaged in the generation of electricity.

6. It should also be recognized that this source could be exempted from PSD coverage by the Governor of the Commonwealth of Massachusetts in approximately 9 months after the state has revised its SIP to include significant deterioration within their new source review program.

7. It is the Agency's opinion, after reviewing the source design, that a further significant deterioration permit would not result in any further environmental

improvement over and above that which is going to be required by the state's permits.

In summary, we feel that the PSD categories were intended to cover certain specific types of source which were major polluters. No catch-all category was included e.g., total emission or total heat input, although this would not have been difficult. The MATEPZfacility is closest to the "Fossil-Fuel Steam Electric Plant" category but does not fit because it primarily generates steam, not electricity, and its electric-generation related beat input is well below the 1,000 million BTU per hour level (equivalent to 235 million BTU per hour). To attempt to include the facility in this category would represent a substantial departure from the Agency's intent.

cc: R. Biondi, DSSE

EXHIBIT 148

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,

Plaintiff(s),

ENVIRONMENTAL DEFENSE, NORTH CAROLINA SIERRA CLUB, NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP,

vs. Case No. 1:00CV126

DUKE ENERGY CORPORATION,

Defendant(s).

VIDEOTAPED
DEPOSITION

WITNESS:	JOHN HEWSON
DATE:	Monday, December 17th, 2001
TIME:	9:30 a.m.
LOCATION:	Allgood, Childs & Mehrhof 615 Telfair Street Augusta, Georgia
TAKEN BY:	Attorneys for the Defendant
REPORTED BY:	LISA D. JETER, Registered Professional Reporter

* * *

[64] '99. Approximately one year after the inspection was done.

It was shortly thereafter that Mr. Baig left the agency. All the information had come in. And then at that time, I was officially told that my top priority and my job was, again, to do things for the electric utility industry full-time. And I, at that point, reviewed all of the information that had come in on the information request.

Q. For Tampa Electric?

A. For Tampa Electric. It was approximately 25 boxes of information – 22 boxes, I think it was. And I sat in a room about like this for a few months and reviewed the information. And that is what I did from April of '99 through – through the rest of that year.

But the next major event – well, there were a lot of things going on, and I'm not going to be able to remember exactly when. But there were a lot of meetings in headquarters. I was probably going to a minimum of four meetings a year in headquarters.

Q. All about the utility –

A. That's correct.

Q. – enforcement initiative?

A. That's correct. I believe – yeah, okay. It would have been in '99 that we had, I believe it was [65] three meetings regarding how to do the emission calculations.

Q. And those meetings were occurring in 1999?

A. There were – again, I better not – it may have been two. It was either two or three meetings in '99, and these would be generally two- or three-day meetings, generally at the Department of Justice. It would be probably, you know, a minimum of four justice attorneys.

Oh, at this point, Jim Jackson was no longer associated with the electric utility initiative directly. He had been replaced by Greg Jaffe.

Q. Why did that replacement occur?

A. It's my understanding that Jim Jackson was working on another EPA initiative to look into the compliance status at oil refineries. And so he couldn't – you know, again, this would have been his management's call. I – so really it's my speculation. But, you know, his management, Bruce Buckheit, had put him on the – to spearhead an initiative for the petroleum refineries, and then he replaced him with Greg Jaffe.

Q. So you had at least two meetings in 1999 about how to do emission calculations –

A. That's correct.

* * *

[69] Q. How did – how did you learn how to do the emission calculations?

A. Through the conversations that we had had about it, and the conversations that I had had with Gregg Worley – and I – at this point, I believe, Jim Little was on board with EPA – conversations I would have had with Jim Little, and my reading and interpreting of the regulation.

Q. And these conversations you're talking about, where you learned how to do the emission calculations to you could make this presentation in the fall of '99, are these – are we talking about conversations that occurred in 1999 at the other two meetings?

A. I think that in the fall of '99, one of the – that in the fall of '99, the different people were putting different emphasis on different emission calculations. And I think that this was really a meeting to make sure that EPA spoke with one voice and came up with its best – its policy on what – what the procedure should be when you do an emission calculation. I guess the thing with the emission calculations is that there are several different calculations that can and probably should be done.

And so – and each situation is different with the – with respect to a major modification. So this [70] was really a training to see what the other regions were doing to date and how they were doing the emission calculations, and to inform the Department of the Justice attorneys and others who were learning about PSD for the first time and were not as familiar with the process.

Q. How did it happen that the regions were doing the emission calculations in different ways –

MR. DION: Objection to form.

THE WITNESS: I would –

BY MR. COTTINGHAM:

Q. – in 1999?

A. I would say that, again, there is – if you look at the PSD rule itself, as it stands now, it's – there is something called "actual emissions," is one of the definitions, one of the terms that's defined. I can't remember exactly, but I believe that the term has approximately five subletters under it, in how it's defined. In other words, it can be defined as what most people would consider actual emissions, kind of the way Webster would – would – what's

actually put into the environment, loaded into the environment, is the first definition that's given.

* * *

EXHIBIT 189

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
[LOGO] Office of Air Quality Planning and Standards
Research Triangle Park, North Carolina 27711

May 25, 1990

MEMORANDUM

SUBJECT: Letter to John Boston,
Wisconsin Electric Power Company (WEPCO)

FROM: Gerald A. Emison, Director /s/ Gerald A. Emison
Office of Air Quality Planning and Standards
(MD-10)

TO: William G. Rosenberg, Assistant Administrator
for Air and Radiation (ANR-443)

The attached letter to John Boston of WEPCO provides the company with the Environmental Protection Agency's (EPA's) response to the court decision in the *WEPCO* case. As you will recall, although the WEPCO issue has come to be associated with the applicability of the Agency's new source review program to utility companies also subject to acid rain requirements, the original case involved the replacement of a major component at the Port Washington power plant owned by WEPCO. The WEPCO sued on EPA's determination that the replacement, and other associated changes, made the plant subject to EPA's new source review requirements. The court upheld EPA's determination in large part, but concluded that the Agency's method of determining whether the WEPCO action was subject to the prevention of significant deterioration (PSD) rules needed to be revised. The court found that in calculating whether the

particular kind of change would increase emissions, EPA should make a projection of the plant's actual emissions in the future, rather than assuming that the plant would operate at its maximum capacity.

The letter to Mr. Boston sets forth the way in which EPA has calculated the WEPCO plant's "estimated future actual emissions." In making this calculation we have relied on the utility's own data concerning the plant's historical operations and the company's projections of the plant's future operation and emissions rates, as reflected in papers filed with the Wisconsin Public Utility Commission and the Wisconsin Department of Natural Resources.

The result is that WEPCO is subject to PSD but only for nitrogen oxides (NO_x). The permit will require the same enforceable limits on the fuel sulfur content and particulate controls as those proposed by WEPCO. It will not restrict future operating levels.

With regard to the new source performance standards (NSPS), WEPCO proposes to avoid triggering NSPS for the reconstruction by further controlling two units to a level sufficient to offset projected emissions increases. Unit 5 is not being renovated at this time. If in the future it is renovated, it would be subject to NSPS. We have discussed this with the company and find their proposal acceptable.

On April 6, my staff met with WEPCO representatives to discuss our revised applicability determination. On April 10, WEPCO informed us that they would not challenge such an applicability determination and would proceed with the necessary PSD permit for NO_x if the State found that no further NO_x control is necessary. A PSD permit application for NO_x has already been submitted by WEPCO to the State. The State has agreed that the

Port Washington boilers' characteristically low emissions of NO_x represent best available control technology for the renovation project. The WEPCO is anxious to receive the attached letter from EPA so that it can proceed with the processing and issuance of the State permit.

Both WEPCO and Wisconsin are aware of, and concur with, the basis for our revised determination and have indicated no disagreement. This letter will allow WEPCO and the State to process the PSD permit.

Attachment

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA Plaintiff, v. DUKE ENERGY CORPORATION, Defendant.	)	CIVIL NO. 1:00CV1262

EXHIBITS IN SUPPORT OF UNITED STATES RESPONSE TO DUKE'S PROPOSED SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ITS MOTION FOR RECONSIDERATION

(Filed Oct. 8, 2003)

* * *

EXHIBIT 1

ANALYSIS OF THE POTENTIAL COST, ENVIRONMENTAL AND ENERGY IMPLICATIONS OF EPA'S RECENT WEPCO AND GREENWOOD DECISIONS

Prepared For
The Utility Air Regulatory Group

By
ICF Resources Incorporated

January 1990

* * *

These oil capable plants that might switch to gas in the future were, therefore, identified as potentially affected.

Two types of data were used to identify those plants that were "only oil capable": historic fuel consumption data and the Energy Information Administration's (EIA) *Inventory of Power-plants.*

- The Utility Data Institute (UDI) provided historic fuel consumption data for the period 1980-1987. Using the UDI data, "only oil capable" plants were identified as those that did not use *any* gas over the entire period.[1]

[1] It is possible that a small amount of gas might be used at a plant for flame stabilization or other purposes without indicating that the plant was gas capable. For this analysis, however, it was conservatively assumed that consuming even a small quantity of gas indicated that the plant could be considered gas capable.

- Oil powerplants in EIA's *Inventory of Powerplants* which were not listed as having the capability of burning gas (as either the primary or secondary fuel) were also defined as oil capable.

An initial list of potentially affected plants was developed combining these two sources, and then certain plants were eliminated because it was assumed that they would not be affected by the modification rule. Those plants that were not forecast to switch to gas over the forecast period were eliminated because they were assumed to not engage in activities that could trigger the rule. It was assumed that most "oil capable" plants, except some plants in New England and New York where gas access might be limited, would switch to gas. Those plants in the Northeast that would not be expected to switch to gas were identified based on previous electric utility and gas market studies conducted by ICF Resources, as well as based on a survey of electric utilities. Based on this research, 26 units (with a combined capacity of almost 6 GW) were eliminated from the list.

It was assumed that the "oil capable" plants identified as potentially affected under the modification rule would switch to gas in the near-term, given the relative prices of gas and oil assumed in the base case. Thus, these plants (totaling 22GW) were all assumed to be affected by the rule in 1995.

Affected Coal Plants

In the Wisconsin Electric Power Co. (WEPCo) case, the Port Washington coal-fired powerplant was targeted by EPA under the modification rule because it had been

operating at a low capacity factor and reduced capacity for a number of years prior to its planned refurbishment. Based on the plant's recent performance, EPA determined that an emission increase would result from the maintenance activities, which were expected to return the plant to its original operating levels. Therefore, it was assumed that coal plants with consistently poor performance or availability could be targeted by EPA when they refurbished.[2]

It is impossible to project future performance levels and availability, so historic capacity factor data was used to identify poorly performing plants. Using capacity factor data provided by UDI and an ICF Resources database (which was developed using FERC Form 767 data), powerplant units with low capacity factors over the period 1986-1988 were identified. It was assumed that these plants would become "affected plants" at age 30 when they refurbished, because refurbishment would be expected to improve performance which could result in an emissions increase.

A three-year average capacity factor was computed for the period 1986-1988. Excluding units already meeting NSPS, units with average capacity factors of less than 30 percent over the period were identified as potentially affected by the modification rule. Those few units that were already scrubbed were eliminated from this list reflecting the likelihood that the existing scrubber designs

* * *

[2] Although the actual age at which a plant might undertake refurbishment activities might vary, it was assumed that most plants would begin these activities at around age 30. Thus, for simplicity it was assumed that all affected plants would be targeted at age 30.

could meet NSPS requirements. Those units with net dependable capacity of less than 50 MW were eliminated from this list as well because these units were assumed not to refurbish in the base case and retire in 45 years. In addition, units forecast to repower in the base case were also eliminated from the list because these plants were already assumed to have to comply with NSPS regulations in the base case. A total of 15 GW of coal capacity was assumed to be affected by 2010 based on these criteria.

High Impact Cases

In the High Impact cases, much broader definitions were used to identify affected powerplants because it was assumed for these cases that EPA would interpret the rule more aggressively. In fact, in these cases, it was assumed that almost every powerplant would undertake some type of maintenance or refurbishment activity over its lifetime that would trigger the modification rule. Thus, in the High cases it was assumed that EPA would target almost all coal, oil and gas powerplants at 30 years of age. As in the Low cases, moreover, those oil only plants forecast to switch to gas in the base case forecast were also considered affected in 1995.

Certain groups of plants were considered unlikely to be affected by the modification rule, however. On both the oil/gas and coal lists, for example, powerplants with net dependable capacity of less than 50 megawatts were not considered affected consistent with the assumption used in the base case that these units would not likely engage in major maintenance/refurbishment and would retire after 45 years (instead of 65 years for plants engaging in major maintenance/refurbishment). For coal plants, moreover,

those units that were forecast to repower, had already reconverted from oil to coal, or were already scrubbed were also not considered to be affected.

Given the cost differential between conventional NO_x controls and SCR, it was assumed that plants required to install SCR under the modification rule would choose early retirement, while plants that could net out of PSD by installing conventional controls would choose to refurbish or fuel switch. Thus, all non-NSPS oil/gas plants were assumed to refurbish with conventional NO_x controls and the few NSPS oil/gas plants were assumed to retire early.

Affected Coal Plants

It was assumed that coal plants could be required under the modification rule to comply with PSD and/or NSPS. NSPS regulations apply if an emissions increase measured in kilograms per hour occurs, which is typically associated with an increase in capacity. PSD regulations, in contrast, apply if an emissions increase measured in tons per year occurs, which is typically associated with an increase in capacity factor.

For some pollutants, NSPS and PSD regulations require installation of similar pollution control equipment. For other pollutants, such as NO_x, however, different pollution control equipment is required. NSPS NO_x regulations, for example, require installation of conventional NO_x controls, while PSD regulations require installation of SCR, which is more stringent and, hence, more expensive. As with oil/gas plants, however, coal plants could "act out" of PSD by making smaller reductions by reducing the plant's overall emissions or emissions at other plants to

the point where emissions before and after refurbishment are the same.

For this analysis, it was assumed that affected coal plants would be required to comply with NSPS regulations for two reasons: (1) many coal plants could experience small gains in capacity associated with refurbishing, either by returning a plant to its original design capacity or by rerating the plant which would require NSPS to be met; and (2) those plants that experienced *only* an increase in capacity factor and hence should be targeted by PSD regulations could potentially install less stringent controls and "net out." It is unclear what baseline would be allowed in netting out of these reductions and NSPS was assumed as a mid-range assumption (less stringent than PSD but more stringent than allowing fuel switching for netting out). Thus, it was assumed that coal plants would be required to comply with NSPS for SO_2, NO_x and particulates (TSP).

Compliance with either NSPS or PSD SO_2 regulations would require installation of a retrofit scrubber. NO_x regulations could be met by installing conventional NO_x controls at most plants except those with wet-bottom or cyclone boilers, which cannot use conventional NO_x controls and would thus have to install SCR. It was assumed that NSPS particulate standards could be met by either increasing plate area in an affected plant's electrostatic precipitator or by flue gas conditioning.

To determine which compliance strategies would be chosen by different types of coal plants, a detailed economic analysis was prepared which compared the present value of costs over a 30-year period of refurbishing and installing the required pollution control equipment to the

ost of retiring in 15 years and building new capacity. The esults of these analyses are summarized in Table 3 and escribed below. Unlike oil/gas plants, it was assumed nat the compliance choices of coal plants would change if cid rain legislation is enacted because of the added value f SO_2 reductions under a bill. Thus, the assumed compli- nce choices for both the "No Acid Rain" and the "With cid Rain" cases are presented below.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA,	)	
Plaintiff and Counter-Defendant,	)	
and	)	
ENVIRONMENTAL DEFENSE; NORTH CAROLINA SIERRA CLUB; and NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP CITIZEN LOBBY/ EDUCATION FUND,	)	
Intervenor-Plaintiffs,	)	
v.	)	CIVIL NO. 1:00CV01262
DUKE ENERGY CORPORATION,	)	
Defendant and Counter-Claimant.	)	

ORDER

(Filed Feb. 23, 2004)

BULLOCK, District Judge

On December 23, 2003, Plaintiff moved for reconsideration of the court's August 26, 2003, summary judgment order, or, in the alternative, to certify the order for interlocutory appeal. Plaintiff contends that the order should be reconsidered in light of documents recently made available to the Plaintiff that the Defendant received from

counsel for the Utility Air Regulatory Group, a non-profit association of electric utility companies and trade associations of which Defendant is a member. Plaintiff contends that these documents show that Defendant knew, or should have known, that EPA's test for "routine maintenance" focused on routine maintenance at an individual unit in the relevant industry. Plaintiff also contends that Duke also knew that the agency contended PSD was triggered by increases in total annual emissions notwithstanding the absence of an increase in maximum hourly emission rates.

Defendant contends that reconsideration is not warranted because Plaintiff's "newly discovered evidence" is not relevant to the issues decided by the court, is cumulative to evidence that the court has already seen, and is not inconsistent with the court's order. Defendant also opposes certification for interlocutory appeal.

In drafting its opinion and order, the court undertook a painstaking review of the statutory and regulatory framework. Relying on the statutes and legislative intent, the court held that "[i]n order to give PSD RMRR exemption its proper scope, this provision must be defined according to what is routine maintenance, repair, and replacement within the relevant source category. This construction is compelled by the statutory mandate of the PSD program and congressional intent." *United States v. Duke Energy Corp.*, 278 F. Supp.2d 619, 631 (M.D.N.C. 2003). The court also found "based on the PSD rules, the contemporaneous interpretations of the PSD rules, and the statutory language incorporating the NSPS concept of modification into PSD, post-project emissions must be calculated on an annual basis, measuring emissions in tons per year, and in calculating post-project emissions

levels, the hours and conditions of operation must be held constant." *Id.* at 640. Thus, even assuming that the EPA may have spoken out of both sides of its mouth on these issues, the primary basis for the court's holding was the plain statutory language and congressional intent. The question of fair notice, the basis for the Plaintiff's relevance argument, is no longer an issue for trial.

In the alternative, Plaintiff asks the court to certify its order for an immediate appeal pursuant to 28 U.S.C. § 1292(b). The statute requires that certification be based upon the district judge's "opinion that such order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." All three requirements must be satisfied. Although not in the statutory language, courts have held that to warrant an interlocutory appeal the appellant must demonstrate "'that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.'" *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 475 (1978) (quoting *Fisons, Ltd. v. United States,* 458 F.2d 1241, 1248 (7th Cir. 1972)). Because certification should not be granted routinely, procedural requirements for interlocutory appeal should be strictly construed. *See Myles v. Laffitte,* 881 F. 2d 125, 127 (4th Cir. 1989).

This case began in December 2000. Extensive discovery has been completed, dispositive motions have been ruled upon, and the case is essentially ready for trial. An interlocutory appeal would delay rather than advance the ultimate termination of this case. Further, it does not appear that a trial would be unusually lengthy. Plaintiff has conceded that the court's ruling that PSD is triggered

only by projects that increase the unit's maximum hourly emissions rate will likely be determinative "of most if not all of the PSD claims in this case." Plaintiff has also admitted that it does not contend that projects of the type performed by Duke are unprecedented or even uncommon in the utility industry. While these standards are ones on which reasonable minds might disagree, this alone does not warrant interlocutory appeal. All three requirements of the statute must be viewed together. Regardless of whether Plaintiff has raised a controlling question of law as to which there is substantial ground for differences of opinion, the court does not believe the possibility that the court of appeals would entertain an interlocutory appeal of the court's summary judgment order would materially advance the termination of this litigation.

NOW, THEREFORE, the Plaintiff's motions for reconsideration of the court's summary judgment order, and, alternatively, to certify its order for interlocutory appeal [Doc. #268], are **DENIED**.

The court will direct the Clerk to schedule this case for trial during the July term and provide proper notice to the parties.

/s/ _____
United States District Judge

February 23, 2004

THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA, Plaintiff, and ENVIRONMENTAL DEFENSE, ET AL., Plaintiff-Intervenors, v. DUKE ENERGY CORPORATION, Defendant.	)	Civil Action NO. 1:00 CV 1262

STIPULATIONS IN SUPPORT OF JOINT MOTION FOR ENTRY OF FINAL JUDGMENT, TO STAY CONSIDERATION OF RULE 72(a) OBJECTIONS, AND TO STAY ENFORCEMENT OF DISCOVERY ORDER

(Filed Apr 13, 2004)

Pursuant to the Joint Motion for Entry of Final Judgment To Stay Consideration of Rule 72(a) Objections, and To Stay Enforcement of Discovery Orders; Plaintiff United States of America, Plaintiff-Intervenors Environmental Defense, *et al,* Defendant Duke Energy Corporation ("Duke Energy"), and non-party Utility Air Regulatory Group ("UARG") submit the following stipulations:

1. Plaintiff and Plaintiff-Intervenors stipulate that their contention that each of the projects at issue in this case resulted in a significant net emissions increase within

the meaning of the relevant PSD regulations is based solely on their contention that the projects would have been projected to result in an increased utilization of the units at issue.

2. Plaintiff and Plaintiff-Intervenors stipulate that they do not contend that the projects at issue in this case caused an increase in the maximum hourly rate of emissions at any of Duke Energy's units.

3. Plaintiff and Plaintiff-Intervenors stipulate to the dismissal, with prejudice, of those Claims for Relief which are not PSD claims (the "Non-PSD Claims"), *i.e.*, the even-numbered Claims for Relief in the Complaint, as incorporated by reference in the Complaint-in-Intervention.

4. Defendant stipulates to the dismissal of its counterclaims in this action, without prejudice to revive such counterclaims in the event of a remand of this case as the result of an appeal. In the event of a remand, Plaintiff and Plaintiff-Intervenors will not oppose Defendant's counterclaims on timeliness or statute of limitations grounds.

5. The Parties stipulate that the Court stay enforcement of Magistrate Judge Eliason's Orders regarding the UARG documents (Docket Nos. 164, 244 and 250) and stay consideration of Duke Energy's Rule 72(a) Objections (Docket No. 252) and UARG's Rule 72(a) Objections (Docket No. 251 and 281) to those orders. Upon entry of such a stay and a final judgment and order pursuant to the Joint Motion for Entry of Final Judgment, Plaintiff shall return the documents that are the subject of those Orders and Objections and any and all copies of these documents to Defendant. Defendant shall retain and preserve these documents.

6. Upon entry of an Order staying enforcement of Magistrate Judge Eliason's Orders regarding the UARG documents (Docket Nos. 164, 244 and 250) and staying consideration of Duke Energy's Rule 72(a) Objections (Docket No. 252) and UARG's Rule 72(a) Objections (Docket No. 251 and 281), Plaintiff and Plaintiff-Intervenors agree to the withdrawal of the documents submitted as Exhibits 166-176 in support of Plaintiff's Motion for Reconsideration (Docket No. 268) and stipulate that these documents and the other documents that are the subject of Duke Energy's Rule 72(a) Objections (Docket No. 252) and UARG's Rule 72(a) Objections (Docket No. 251 and 281) shall not be part of the record in any appeal of the final judgment entered pursuant to the Joint Motion for Entry of Final Judgment. Plaintiff and Plaintiff-Intervenors further stipulate that they shall not refer to these documents and the other documents that are the subject of Duke Energy's Rule 72(a) Objections (Docket No. 252) and UARG's Rule 72(a) Objections (Docket No. 251 and 281) in any of their argument or filings in the course of that appeal.

7. In the event of a remand after appeal of a final judgment entered pursuant to the Joint Motion for Entry of Final Judgment, Plaintiff and Plaintiff-Intervenors reserve the right to seek to lift the stay of enforcement of Magistrate Judge Eliason's Orders regarding the UARG documents (Docket Nos. 164, 244, and 250), and Defendant and UARG reserve the right to seek to lift the stay of consideration of Duke Energy's Rule 72(a) Objections (Docket No. 252) and UARG's Rule 72(a) Objections (Docket No. 251 and 281).

8. With respect to the miscellaneous action pending in the United States District Court for the District of

Columbia relating to subpoenas served upon UARG, Plaintiff agrees to withdraw the subpoenas served on UARG in *United States v. Duke Energy Corp.* (M.D.N.C.). If this case is remanded as the result of an appeal, UARG and Defendant will not oppose the enforcement of new subpoenas as untimely.

9. Defendant stipulates to the withdrawal of Duke Energy's Motion for Sanctions (Docket No. 286) with prejudice, and Duke Energy's Motion to Strike Exhibits 166-176 (Docket No. 282), without prejudice.

10. Plaintiff and Plaintiff-Intervenors reserve the right to appeal the final judgment as to the PSD claims in this action. *i.e.*, the odd-numbered Claims for Relief in the Complaint, as incorporated by reference into the Complaint-in-Intervention. Defendant agrees and stipulates that the final judgment entered in connection with these stipulations is appealable by Plaintiff and Plaintiff-Intervenors as of right pursuant to 28 U.S.C. § 1291 with respect to the PSD claims in this action.

Dated: April 13, 2004

Respectfully submitted,

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No. 05-848

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In The

Supreme Court of the United States

ENVIRONMENTAL DEFENSE, et al.,

Petitioners,

v.

DUKE ENERGY CORPORATION, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE PETITIONERS

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JULY 2006

QUESTIONS PRESENTED

In this civil enforcement action under the Clean Air Act, the Fourth Circuit ruled that EPA's definition, embodied in a 1980 regulation, of emissions "increases" for purposes of the Prevention of Significant Deterioration (PSD) program violates the Act because it differs from a regulatory definition EPA employs to measure emissions increases under another program under the Act, the New Source Performance Standards (NSPS). Both the court's holding and its analysis of the statute conflict with decisions of other courts, including a decision rendered by the D.C. Circuit rejecting challenges to the very regulations at issue in this case, *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005). The questions presented are:

1. Whether the Fourth Circuit's decision violated Section 307(b) of the Act, which provides that national Clean Air Act regulations are subject to challenge "only" in the D.C. Circuit by petition for review filed within 60 days of their promulgation, and "shall not be subject to judicial review" in enforcement proceedings, 42 U.S.C. 7607(b); and

2. Whether the Act's definition of "modification," which turns on whether there is an "increase" in emissions and which applies to both the NSPS and PSD programs, rendered unlawful EPA's longstanding regulatory test defining PSD "increases" by reference to actual, annual emissions.

PARTIES TO THE PROCEEDINGS

Petitioners Environmental Defense, North Carolina Sierra Club, and North Carolina Public Interest Research Group Citizen Lobby/Education Fund intervened as plaintiffs in the district court and were appellants in the court of appeals. Respondent the United States was plaintiff in the district court and an appellant in the court of appeals. Respondent Duke Energy Corporation was defendant in the district court and was the appellee in the court of appeals.

STATEMENT PURSUANT TO RULE 29.6

None of the petitioners that are corporations has a parent company, and no publicly held company owns 10% percent or more of the stock of any such corporate petitioner.

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CASES

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Alabama Power Co. v. Costle, 606 F.2d 1068 (1979).....9

Alabama Power v. Costle, 636 F.2d 323 (1979)..... passim

Alaska Dept. of Env'l Conservation v. EPA,
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Appalachian Power Co. v. EPA, 249 F.3d 1032
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ASARCO, Inc. v. EPA, 578 F.2d 319
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Auer v. Robbins, 519 U.S. 452 (1997).....34

City of Tacoma v. Taxpayers of Tacoma,
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Citizens to Save Spencer County v. EPA,
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Dayton Power & Light Co. v. EPA, 520 F.2d 703 (6th Cir. 1975).....28

E. I. du Pont de Nemours & Co. v. Train, 430 U.S. 112 (1977).....27

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F.C.C. v. ITT World Commc'ns, Inc., 466 U.S. 463 (1984).....27

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General Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004).....44

General Motors Corp. v. United States, 496 U.S. 530 (1990).....4

Harrison v. PPG Industries, Inc., 446 U.S. 578 (1980)..... passim

Hawaiian Elec. Co. v. EPA, 723 F.2d 1440 (9th Cir. 1984).....29

Helvering v. Stockholms Enskilda Bank, 293 U.S. 84 (1934).....44

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Lubrizol Corp. v. Train, 547 F.2d 310 (6th Cir. 1975).....28

National Cable & Telecomms. Ass'n v. Brand X Internet Servs., 125 S. Ct. 2688 (2005).....28

National Mining Ass'n v. EPA, 59 F.3d 1351 (D.C. Cir. 1995).....11,44,47

New York v. EPA, 413 F.3d 3 (D.C. Cir. 2005)..... passim

New York v. EPA, 443 F.3d 880 (D.C. Cir. 2006).....37,50

NLRB v. Cheney Cal. Lumber Co., 327 U.S. 385 (1946).....27

Northern Plains Resource Council v. EPA, 645 F2d 1349 (9th Cir. 1981).....46

O'Donoghue v. United States, 289 U.S. 516 (1933).....27

Puerto Rican Cement Co. v. EPA, 889 F.2d 292 (1st Cir.1989)..... passim

Robinson v. Shell Oil Co., 519 U.S. 337 (1997).....41,44

Rowan Cos., Inc. v. United States, 452 U.S. 257 (1981)..... passim

Fla. Power & Light Co. v. Lorion, 470 U.S. 729 (1985).....29

S.D. Warren Co. v. Maine Bd. Of Environmental Protection, 126 S. Ct. 1843 (2006).....49

State ex. rel. Utilities Comm. v. Eddleman, 358 S.E.2d 339 (N.C. 1987).....19

Thomas Jefferson Univ. v. Shalala,
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Train v. NRDC, 421 U.S. 60 (1975).....38

Union Elec. Co. v. EPA, 427 U.S. 246 (1976).....4

United States v. Cinergy Corp.,
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United States v. Cleveland Indians Baseball Co.,
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United States v. Ethyl Corp., 761 F.2d 1153
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United States v. Ohio Edison Co., 276 F. Supp. 2d 829
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United States v. So. Ind. Gas & Elec. Co.,
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United States v. Vogel Fertilizer Co., 455 U.S. 16 (1982) ...44

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The district court's opinion (Pet. App. 22a) is reported at 278 F. Supp. 2d 619, and its order granting final judgment (Pet. App. 85a) is unreported. The court of appeals' opinion (Pet. App. 1a) is reported at 411 F.3d 539.

JURISDICTION

The court of appeals denied rehearing en banc on August 30, 2005. This Court granted certiorari on May 15, 2006 (126 S. Ct. 2019). Jurisdiction rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS

Relevant provisions of the Clean Air Act (Act or CAA), 42 U.S.C. 7401 *et seq.*, and of Title 40 of the Code of Federal Regulations are reproduced in an addendum to this brief.

STATEMENT

This case arises from an extensive "Plant Modernization Program" by which respondent Duke Energy Corporation (Duke) undertook to refurbish coal-burning power plants. Because of age and physical deterioration, these plants could operate only sporadically (and in some cases had been shut down for years) and, without modernization, they were due to be retired and replaced. The United States brought an enforcement action alleging that Duke's projects triggered the Act's Prevention of Significant Deterioration (PSD) provisions, which apply when a source undergoes a "modification," *i.e.*, "[a]ny physical change" that "increases the amount of any air pollutant emitted by such source." 42 U.S.C. 7411(a)(4), 7479(2)(C). The United States maintained that, under regulations promulgated by the Environmental Protection Agency (EPA) in 1980 and 1992 defining PSD modifications as physical changes that increase "actual" emissions, measured in "tons per year," a modernization that enables a source to operate more of the time – and emit more pollution – requires a PSD permit.

The Fourth Circuit held that the enforcement suit could not proceed, reasoning that Congress had required EPA to adopt a

regulatory test for PSD "modifications" identical to one the agency uses in regulations implementing the distinct New Source Performance Standards (NSPS) program. Under that NSPS standard, a modification cannot occur unless there is an increase in a source's maximum hourly emissions rate. Like other tests of emissions capacity or potential, that test excludes consideration of how much of the time (and how intensively) a source in fact operates. It thus exempts from PSD coverage the comprehensive overhaul of an old source – a source that, due to age and physical decay, was inoperative most or all of the time – even when the modernization project's result is to "increase[] the amount of any air pollutant emitted by such source" by hundreds or thousands of tons per year.

In imposing that result, the Fourth Circuit starkly violated Section 307 of the Act. That provision vests the D.C. Circuit with exclusive jurisdiction to review challenges to nationally applicable CAA regulations, and, in strong terms, disables courts in enforcement actions from deciding issues that could have been presented to the D.C. Circuit. 42 U.S.C. 7607(b), (e). The rationale the Fourth Circuit offered for finding the jurisdictional bar inapplicable – that the court was merely "interpreting" rather than invalidating EPA's regulations – does not withstand a moment's scrutiny. Even if courts were free to substitute their reading of a regulation for that of the agency, the court of appeals here did not actually "construe" the PSD regulations, whose language and preamble the court deemed "irrelevant" to the case because of what it saw as a peremptory *statutory* command. In fact, the PSD regulations manifestly cannot be "interpreted" to be the same as the NSPS regulations, or to impose an hourly rate test.

It would be hard to imagine a more serious affront to the exclusive review role Congress assigned to the D.C. Circuit. The 1980 regulations the Fourth Circuit found contrary to statute were, in relevant part, adopted to conform to the D.C. Circuit's decision in *Alabama Power v. Costle*, 636 F.2d 323 (1979), which construed the Act's PSD provisions to *mandate*

that EPA evaluate whether the program applies to physical changes by looking at their effects on "*actual* emissions," and held the PSD statute to *require* distinctive regulatory elements that the D.C. Circuit had held *unlawful* for NSPS. And the Fourth Circuit's decision was issued even as numerous parties, including Duke, were challenging the same regulations in the D.C. Circuit. In a decision rendered nine days after the Fourth Circuit's, *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005), the D.C. Circuit not only rejected (on merits and waiver grounds) the very statutory challenges Duke successfully pressed in the instant case, but also held, based in part on distinctive statutory requirements of the PSD program, that EPA *must* measure PSD modifications by increases in a source's "actual" emissions, not "potential" or "allowable" emissions.

Even if Congress had not been so clear in forbidding courts in enforcement actions from deciding broad statutory questions assigned to the D.C. Circuit, the interpretation imposed by the court below could not stand. EPA's regulatory test for PSD modifications – tailored to the D.C. Circuit's construction of the Act in *Alabama Power*, and upheld in full in *New York* – is easily a permissible reading of the statute, one carefully calibrated to the distinctive textual requirements and programmatic purposes of the Act's PSD provisions. Indeed, the Fourth Circuit did not identify the slightest inconsistency between EPA's regulatory test and the language of the statutory definition it implements.

Instead, relying on *Rowan Cos., Inc. v. United States*, 452 U.S. 247 (1981), the court of appeals invoked what it perceived as a congressional "mandate" on EPA to adopt identical regulatory definitions of source "modification" for the NSPS and PSD programs. But this Court has never – in *Rowan* or any other case – endorsed any such rigid presumption. To the contrary, the Court has consistently emphasized the need to interpret each term of a complex regulatory statute like the CAA in light of the specific statutory context in which it functions. As the D.C. Circuit

has held, EPA's regulations not only may but *must* give effect to the PSD provisions' distinctive and explicit targeting of the actual "tons per year" of pollution emitted by major emitting sources. The test urged by Duke and imposed by the court below (without consideration of its patent lack of fit with the PSD provisions of the Act) would exempt plant renovation projects that undeniably increase the amount of air pollutants emitted by a source by thousands of tons a year. That test is inconsistent with the plain text, intricate mechanics, and fundamental objectives of the statutory PSD program, and with D.C. Circuit holdings in jurisdictionally proper Section 307(b) rulemaking reviews.

A. Statutory And Regulatory Background

1. The 1970 Act. Congress enacted the Clean Air Act Amendments of 1970 "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. 7401(b). The CAA directs EPA to establish National Ambient Air Quality Standards (NAAQS) for air pollutants at a level requisite to protect public health and the welfare, *id.* 7409, and authorizes States to establish state implementation plans (SIPs) containing measures sufficient to achieve and maintain the NAAQS. *Id.* 7410. See *General Motors Corp. v. United States*, 496 U.S. 530, 533 (1990); *Union Elec. Co. v. EPA*, 427 U.S. 246, 249-50 (1976). EPA has promulgated NAAQS for various pollutants, including sulfur dioxide, nitrogen dioxide, and particulates. 40 C.F.R. pt. 50.

The 1970 Act also established the NSPS program, which directs EPA to prescribe uniform, national, technology-based performance standards for various categories of equipment. 42 U.S.C. 7411. The NSPS apply to newly constructed sources and to those that undergo "modification." 42 U.S.C. 7411(a)(2), (4). Believing that the controls required in the 1970 legislation would suffice to attain the NAAQS, Congress fixed 1975 as the deadline for meeting those standards. 42 U.S.C. 7410(b), (e), (f) (1970). That year

passed, however, with air quality in much of the country still not meeting them. See, *e.g.*, S. Rep. No. 95-127 at 55 (1977); 123 Cong. Rec. 18022 (June 8, 1977) ("record to date" under NSPS had been "disappointing") (Sen. Muskie).

2. The 1977 Amendments and the PSD Program. Responding to these widely recognized failures, Congress enacted the 1977 CAA Amendments, a "lengthy, detailed, technical, complex and comprehensive response to a major social issue." *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 848 (1984). Among their major innovations were two new programs, collectively referred to as New Source Review (NSR): the Nonattainment program (NNSR), codified in Part D of the Act, 42 U.S.C. 7501-7515, which applies to areas failing to meet the NAAQS, and the PSD program, codified in Part C, *id.* 7470-7492, which applies in areas where air quality satisfies those standards.

"Before 1977, no CAA provision specifically addressed potential air quality deterioration in areas where pollutant levels were lower than the NAAQS." *Alaska Dept. of Env'l Conservation v. EPA*, 540 U.S. 461, 471 (2004).[1] The PSD program's purposes include guarding against harms to public health and welfare anticipated to occur notwithstanding NAAQS attainment, protecting air quality in National Parks, and preventing large sources from harming air quality in downwind States. 42 U.S.C. 7470. Congress also established the program to insure "that economic growth will occur in a manner consistent with the preservation of existing clean air resources," and "that any decision to permit increased air pollution * * * is made only after careful evaluation of all the consequences" and based upon "informed public participation." *Id.* 7470(3), (5).

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[1] EPA established an administrative PSD program in 1974. 39 Fed. Reg. 42510 (Dec. 5, 1974). The statutory PSD program enacted in 1977 "follow[ed] the outline" of that program, but is "more elaborate and in many ways more stringent." 45 Fed. Reg. 52676, 52679 (Aug. 7, 1980).

The PSD provisions require permitting prior to construction or modification of "major emitting facilities," large factories and power plants "that emit, or have the potential to emit" 100 or 250 "tons per year" of a pollutant (depending on source type). 42 U.S.C. 7475(a), 7479(1). The permit process requires a "complete" assessment of baseline air quality in the locality and a prediction of the proposed project's effect on local air quality. *Id.* 7475(a), (e). An applicant must show that emissions will not "cause" or "contribute to" an exceedance of any applicable PSD "increment." *Id.* 7473, 7475(a)(3), (d). A "central feature" of the PSD program, *Alabama Power*, 636 F.2d at 374, increments are caps on increases in pollutant concentrations, the most stringent applicable in "class I" areas like National Parks. A source must employ the "best available pollution control technology" (BACT), identified "case-by-case" in light of local environmental and economic factors, *id.* 7475(a), 7479(3), and must comply with NSPS and other CAA requirements. *Id.* 7475(a)(3).

The NSR programs added in 1977 represented a significant departure from the 1970 Act's approach. Whereas NSPS sets categorical, national performance requirements for classes of equipment irrespective of size or location, NSR applies only to the nation's largest pollution sources and demands site-specific review, prior to construction activity, of projected effects on local air quality. See *Chevron*, 467 U.S. at 850 & n.24 (NNSR); *Alabama Power*, 636 F.2d at 346-51 (PSD).

Congress partially "grandfathered" sources built before August 7, 1977, from NSR requirements. See 42 U.S.C. 7475(a). It was widely believed, and asserted before Congress, that many existing plants had limited useful lives and would be shut down within a relatively short time. See, *e.g.*, H.R. Rep. No. 94-1175 at 159 ("electric utility industry" provided testimony that "it is imprudent to backfit FGD [a control technology] into existing plants, especially older units facing retirement within 10-15 years"); S. Rep. No. 95-127 at 128 (1977) ("There are in the United States approximately

200 old coal-fired power plants over 20 years of age. * * * Most will be totally phased out of operation in the next 5 to 20 years.") (additional views of Sen. Baker).

Congress provided, however, that NSR would apply to any "modification" of an existing source. For PSD purposes, "[t]he term 'construction,' when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility." 42 U.S.C. 7479(2)(C).[2] Similarly, under the NNSR program, "[t]he terms 'modification' and 'modified' mean the same as the term 'modification' as used in section 7411(a)(4)." *Id.* 7501(4). Thus, existing sources are subject to NSR when they undergo "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." *Id.* 7411(a)(4) (CAA Section 111(a)(4)). The PSD provisions contain a single, partial exemption for "modifications or expansions" where emissions are less than "50 tons per year." *Id.* 7475(b).

3. Judicial Review of CAA Rulemakings. Intended to promote "even and consistent national application" of EPA's implementing regulations and protect "the integrity of the time sequences provided throughout the Act," S. Rep. No. 91-1196 at 40-41 (1970), Section 307(b) of the Act describes the exclusive means of judicial review of CAA regulations and other EPA actions. See *Harrison v. PPG Industries, Inc.*, 446 U.S. 578 (1980); *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978). Section 307(b)(1) provides that specified actions, including "any * * * nationally applicable regulations promulgated, or final actions taken, by the Administrator

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[2] The PSD provisions as enacted in August 1977 failed to specify that the term "construction" included modifications. Congress corrected that oversight in the Clean Air Act Technical and Conforming Amendments, enacted November 16, 1977, Pub. L. 95-190, § 14(a)(54), 91 Stat. 1402. See *New York*, 413 F.3d at 13; *Alabama Power*, 636 F.2d at 401 n.49.

under" the Act may be challenged "only" in the D.C. Circuit, by petition for review filed "within sixty days" of the promulgation or other final action, except that petitions "based solely on grounds arising after such sixtieth day" are considered timely if filed within 60 days of when those grounds arose. 42 U.S.C. 7607(b)(1). Section 307(b)(2) provides that "[a]ction of the Administrator with respect to which review could have been obtained [by such petition for review] shall not be subject to judicial review in civil or criminal proceedings for enforcement." *Id.* 7607(b)(2).[3] This prohibition applies "whether or not review was actually sought." *Harrison*, 446 U.S. at 605.

In 1977, Congress added Section 307(d)'s detailed requirements for CAA rulemakings, see 42 U.S.C. 7607(d)(1)(J) (PSD), and its prescription that only objections raised in the statutory public comment process or by petition for reconsideration are subject to judicial review, *id.* 7607(d)(7)(B). See *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1055 (D.C. Cir. 2001). The 1977 amendments also added Section 307(e), stating that "[n]othing in [the CAA] shall be construed to authorize judicial review" of EPA regulations or orders under the CAA, "except as provided in this section." 42 U.S.C. 7607(e).

4. *Alabama Power* and the 1980 Regulations. EPA issued initial regulations implementing the 1977 PSD provisions in 1978. 43 Fed. Reg. 26380 (June 19, 1978).

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[3] In 1977, Congress reaffirmed the importance of having the validity of national actions definitively settled by a court expert in administrative law and the CAA's complexities. It rejected a recommendation from the Administrative Conference "to permit the validity of regulations to be challenged in defense to an enforcement proceeding," 41 Fed. Reg. 56767, 56768 (Dec. 30, 1976), and amended Section 307(b) to *expand* the categories of actions subject to exclusive review. See Pub. L. 95-95 §§ 303, 305, 91 Stat. 685, 772, 776-77 (1977); H.R. Rep. No. 95-294 at 322 (1977) ("reaffirm[ing]" "intent to strictly limit Section 307 challenges"). See also *Harrison*, 446 U.S. at 584-85, 590-91. Congress did accept a recommendation to extend the time to seek review from 30 to 60 days.

Those regulations: (a) defined "modification" as a physical change that increases a source's "potential emission rate," *id.* at 26382; (b) adopted a qualified form of "netting" for measuring intra-source emissions increases (*i.e.*, subtracting contemporaneous decreases in emissions from increases at the source in determining whether a modification has occurred); and (c) restricted PSD applicability to changes that increased a source's potential emissions by at least 100 or 250 tons per year (depending on source type), *id.*

On review under Section 307(b), the D.C. Circuit issued an initial per curiam opinion, *Alabama Power Co. v. Costle*, 606 F.2d 1068 (1979), intended to guide ongoing EPA rulemaking to correct identified flaws in the 1978 rules while the court prepared its full opinion, *id.* at 1077. EPA published proposed regulations that would have confined PSD-triggering "modifications" to those physical changes which increased a source's "potential to emit" pollutants. 44 Fed. Reg. 51924, 51948 (Sept. 5, 1979). Soon thereafter, the D.C. Circuit issued its full decision, 636 F.2d 323 (1979), which explored the PSD enactment in detail.

The court held that EPA's exemption for projects that increased emissions by less than 100 or 250 tons per year was contrary to the Act's "clear language," explaining that:

> Implementation of the statute's definition of "modification" will undoubtedly prove inconvenient and costly to affected industries; but the clear language of the statute unavoidably imposes these costs except for de minimis increases. The statutory scheme intends to "grandfather" existing industries; but the provisions concerning modifications indicate that this is not to constitute a perpetual immunity from all standards under the PSD program. If these plants increase pollution, they will generally need a permit.

Id. at 400. The *Alabama Power* court also held that the distinctive purpose of the PSD provisions required that EPA provide for netting (the "bubble concept"), because "Congress intended to apply the permit process * * * only where

industrial changes might increase pollution in an area, not where an existing plant changed its operations in ways that produced no pollution increase." *Id.* at 401. Acknowledging that in *ASARCO, Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978), it had found EPA's use of a bubble concept *un*lawful for the NSPS program, the D.C. Circuit explained that the different results reflected the "significantly different" regulations and statutory programs at issue. While *ASARCO* had held the bubble to be "contrary to the intent of the NSPS," *Alabama Power* explained, netting was "precisely suited" to PSD's focus on actual consequences for local air quality. 636 F.2d at 402, 406. Cf. *ASARCO*, 527 F.2d at 327, 329.

EPA then promulgated new and extensively revised PSD regulations. 45 Fed. Reg. 52676 (Aug. 7, 1980). The 1980 regulations define a PSD "major modification" as "any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act." 40 C.F.R. 51.166(b)(2)(i) (1987).[4] This definition, like Section 111(a)(4) of the Act, requires two basic determinations: (1) whether a project constitutes a "physical change" (or "change in the method of operation") and (2) whether the change would result in an "increase" in emissions. EPA exempted some activities from PSD requirements at the first step, including certain everyday activities that would otherwise fit within the broad statutory language. Thus, the regulations define "physical change" and "change in the method of operation" to exclude, among other things, "routine maintenance, repair, and replacement," and an "increase in the hours or rate of operation." 40 C.F.R.

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[4] EPA promulgated separate sets of regulations, identical in relevant respects, for incorporation in SIPs, 45 Fed. Reg. at 52729-35 (40 C.F.R. 51.24(b) (1980) (recodified in 1987 at 40 C.F.R. 51.166(b) (1987)), and for areas without approved state plans, 45 Fed. Reg. 52735-41 (40 C.F.R. 52.21(b) (1980)). Following the practice of the courts below, see Pet. App. 5a, 36a, we cite to the regulations as recodified in 1987.

51.166(b)(2)(iii) (*a*), (*f*).[5]

As to the second step, the regulations define a "net emissions increase" as "any increase in actual emissions from a particular physical change or change in method of operation," together with "[a]ny other [contemporaneous] increases and decreases in actual emissions at the source." 40 C.F.R. 51.166(b)(3)(i)(*a*), (*b*).[6] Determining whether there has been an increase requires a source-wide assessment of the "extent that the new level of actual emissions exceeds the old level." *Id.* 51.166(b)(3)(v). The regulations specify that "actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant" during a preceding two-year or other period representative of normal source operation, and that "actual emissions" "shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period." *Id.* 51.166(b)(21)(i), (ii). They provide that for a unit which "has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date." *Id.* 51.166(b)(21)(iv).[7]

"Following the lead" of the D.C. Circuit's construction of the PSD provisions in *Alabama Power*, and the "language" of the statutory definition, EPA announced that it had "shifted the focus of its regulatory definitions from 'potential to emit'

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[5] The regulations also specify pollutant-specific, annual thresholds below which increases are not deemed "significant," and are therefore PSD-exempt. See, *e.g.*, 40 C.F.R. 51.166(b)(23)(i) (40 "tpy" (tons per year) thresholds for nitrogen oxides and sulfur dioxide).

[6] EPA's regulations for the NNSR program use the same test for "modifications." See, *e.g.*, 46 Fed. Reg. 36695, 36697 (July 15, 1981).

[7] The regulations provide that the potential to emit ascribed to a unit can be reduced upon the applicant's agreement to a permit limitation. 40 C.F.R. 51.166(b)(4). See *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292, 297 (1st Cir. 1989). The D.C. Circuit has addressed the potential to emit concept in a number of cases. See, *e.g.*, *Nat'l Mining Ass'n v. EPA*, 59 F.3d 1351, 1361-65 (D.C. Cir. 1995).

to 'actual emissions.'" 45 Fed. Reg. at 52700 (discussing 636 F.2d at 400-01). Adoption of an actual emissions test avoided practical "problems" created by the 1979 proposal's "potential to emit" standard. 45 Fed. Reg. at 52700. Because "an existing source's potential emissions could give a figure considerably higher than what it is actually emitting," that test would yield "paper" reduction credits even as the actual emissions increased – "especially" if, prior to the change, the source "operated only a small part of the time." *Id.* EPA decided to avoid such "'paper offset[s],'" which "could permit actual air quality to deteriorate seriously, while the change which increased actual emissions avoided NSR." *Id.*

5. The *CMA* Litigation. Pursuant to Section 307(b), many parties – including respondent Duke's corporate predecessor – filed petitions for review challenging various aspects of the 1980 PSD regulations in the D.C. Circuit. *Chemical Manufacturers Ass'n v. EPA*, Nos. 79-1112, *et al.* See *New York*, 413 F.3d at 14-15. Certain petitioners – including General Motors and other major industrial firms – attacked EPA's use of an "actual emissions" test in place of the capacity-based test used in the 1978 PSD regulations and the 1979 proposal. Their brief raised as its first issue whether EPA exceeded its "statutory authority" by providing "that a modification subject to review under Parts C and D of the Clean Air Act would occur whenever actual emissions from a source increased as a result of an alteration to that source, even where the source's capacity to emit remains constant." Br. of Industry Pet'rs on Actual Emissions Definition of Net Increase at 1, No. 79-1112, *et al.* (dated Feb. 12, 1981; docketed Feb. 17, 1981).

The *CMA* proceedings were stayed for settlement discussions, which resulted in a 1982 agreement between EPA and certain petitioners – including Duke – under which EPA undertook to propose new regulations, with petitioners reserving the right to reopen their judicial challenge in the event those proposals were not adopted. See Settlement Agreement, D.C. Cir. Case No. 79-1112 (Feb. 22, 1982). The

regulatory changes, set forth in "Exhibit B" to the Agreement, see 61 Fed. Reg. 38250, 38268-69 (July 23, 1996), would have amended the emissions "increase" test "[b]y adding a new subparagraph (b)(2)(v)" to the 1980 PSD regulations providing that a modification "shall not be deemed to occur if one of the following occurs: (a) *there is no significant net increase in the source's potential to emit (as calculated in terms of pounds of pollutant emitted per hour) or* (b) there is no significant net increase in the source's actual emissions." *Id.* at 38269 (emphasis added). Exhibit B also called for EPA to propose "deleting" all 11 instances in which "actual" preceded "emissions" in EPA's regulatory definition of "significant net emissions increase." See *id.* & n.28. EPA published proposed regulations based on the Exhibit B language in 1996, but identified several ways in which such changes could impair the efficacy of the PSD program, 61 Fed. Reg. at 38269-70, and reached a final decision not to adopt the changes in 2002, 67 Fed. Reg. 80186, 80204-06 (Dec. 31, 2002), leading Duke and other petitioners in *CMA* to reopen their challenges to the 1980 rules.

6. Application of the 1980 Regulations. In *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292 (1st Cir. 1989) (Breyer, J.), the First Circuit sustained an EPA determination that the PSD requirements applied to an upgrade project that increased "overall emissions" by enabling a facility to be used more intensively, even though the change did not increase its hourly emissions rate. *Id.* at 293, 297. After upholding EPA's application of its regulations to the project, *id.* at 297-98, the court, pointing to Section 307(b) and *CMA*, rejected as "obviously too late" a claim that the regulations were contrary to the Act. *Id.* at 299.

EPA addressed the 1980 regulations' application to the refurbishment of an old power plant in response to an applicability determination requested by the Wisconsin Electric Power Company ("WEPCo"). EPA rejected the utility's contention that *only* increases in the source's maximum emissions "rate" triggered PSD review, explaining

that "actual emissions are the product of" a source's emissions rate, the production rate, and hours of operation, and that "an increase in any one of these three specified factors, if attributable to a physical or operational change, can trigger an emissions increase for PSD purposes[.]" JA 294.

Reviewing that determination in *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990), the Seventh Circuit observed that the PSD and NSPS regulations measured emissions increases in "a fundamentally distinct manner" – the NSPS rules are "concerned primarily with increases in emissions rates, expressed in kilograms per hour," whereas the PSD rules are "concerned with changes in *total annual emissions*, expressed in tons per year," *id.* at 913, 915 (emphasis original). Recognizing that the emissions increase caused by WEPCo's renovations "would come not from an increase in emission rate, but rather from increases in production rate or hours of operation," *id.* at 916, the court rejected the utility's claim that its project was PSD-exempt under the regulatory language providing that increases in "hours of operation" or "production rate" do not themselves constitute a "physical change," explaining that the exemption "was provided to allow facilities to take advantage of fluctuating market conditions, not construction or modification activity." *Id.* at 916 n.11.

The court in *WEPCo* set aside EPA's application of the "actual to potential" test set forth in the 1980 regulations for sources that "have not begun normal operations," to calculate post-change annual emissions by assuming round-the-clock operation. While agreeing that EPA "cannot reasonably rely on a utility's own unenforceable estimates of its annual emissions," the court found that the record permitted a "'more realistic assessment'" of post-change emissions and remanded to EPA for such an assessment. 893 F.2d at 917 (quoting *Alabama Power*, 636 F.2d at 379); see also *New York*, 413 F.3d at 15. On remand, EPA estimated WEPCo's future annual emissions "based on all the available facts in the record," including how much the unit was likely to be used

after the improvements and at what production and emissions rates – a test referred to as the "actual-to-projected-actual" test – and found that, by that measure, a significant net emissions increase would occur for one pollutant but not for others. JA 68; see 57 Fed. Reg. at 32317 & n.10.

When Congress comprehensively amended the CAA in 1990, see Pub. L. No. 101-549, 104 Stat. 2399 (1990), it debated, but declined to adopt, proposals to amend the Act's PSD provisions to exclude modernization projects like the one at issue in *WEPCo*, including calls to enact a modification test that would only be triggered by increases in a source's "potential capacity" to emit.[8] However, Congress did amend the NNSR provisions, which, like the PSD provisions, incorporate Section 111(a)'s definition of "modification." 42 U.S.C. 7501(4). The 1990 revisions to the NNSR provisions – enacted in response to continuing failure to attain health-based air quality standards in many areas – reaffirmed NSR's focus on actual quantities of pollutants being released and their impacts on local air quality. Congress in 1990 ratcheted down the statutory thresholds,

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[8] An amendment offered by Senator McClure would have exempted any physical change to an "existing utility unit or source" from NSR unless it "increase[d] the maximum potential capacity of the unit or source to emit criteria air pollutants under its physical and operational design." Amt. No. 1404, Sec. 709(g), 136 Cong Rec. S3428 (daily ed. March 28, 1990). See also, *e.g.*, 136 Cong. Rec. S16904 (daily ed. Oct. 27, 1990); 136 Cong. Rec. S16914 (daily ed. Oct. 27, 1990); 136 Cong. Rec. S3383-84 (daily ed. M[illegible]28, 1990); 136 Cong. Rec. S3720 (daily ed. Apr. 3, 1990). The Conference Committee stated that failure to include such provisions in the final version of the bill was "not intended to affect or prejudice in any way the issues or resolution of the WEPCO matter." Joint Explanatory Statement to Accompany S. 1630, Rep. 101-952, 2d Sess. 344-345 (1990). Senator Mitchell observed while in 1970 "it was assumed that electric utility units had an average lifetime of 30 years," many utilities "are now choosing to extend the life of their plants,," thereby "exacerbat[ing]" pollution problems. 136 Cong. Rec. S16904 (daily ed. Oct. 27, 1990). See 136 Cong. Rec. S3723-25 (daily ed. Apr. 3, 1990) (Sen. Chafee); 36 Cong. Rec. S3383-84 (daily ed. Mar. 28, 1990) (Sen. Baucus).

expressed in tonnages of annual emissions, for applying NNSR, based on the severity of an area's pollution. NNSR in "serious" ozone nonattainment areas, for example, was expanded to apply to any source "that emits, or has the potential to emit, at least 50 tons per year." 42 U.S.C. 7511a(c); H.R. Rep. No. 101-490, at 234 (1990) ("regulation of smaller sources is essential for attainment in heavily polluted areas"). The 1990 amendments directed that owners of a modified source "shall assure that the total tonnage of increased emissions of the air pollutant * * * shall be offset by an equal or greater reduction * * * in the *actual* emissions of such air pollutant." *Id.* 7503(c)(1) (emphasis added).

7. The 1992, 1996 and 2002 Rulemakings. After the *WEPCo* decision, EPA adopted regulations that, among other things, addressed the means of calculating post-change emissions for PSD modifications. 57 Fed. Reg. 32314 (July 21, 1992). The 1992 regulations left in place the 1980 regulations' measure of emissions in terms of "actual" emissions measured in "tons per year," and the express requirements that the pre-change baseline take account of the source's hours of operation and production rates. The 1992 PSD regulations added to that test a provision allowing electric utilities to measure post-change emissions using "representative annual emissions" – defined as "the average rate, in tons per year, at which the source is projected to emit a pollutant for the two-year period after a physical change * * * considering the effect any such change will have on increasing or decreasing the hourly rate and on projected capacity utilization," 40 C.F.R. 51.166(b)(32) (1993) – so long as the owner or operator then submits annual emissions data for five years following resumption of regular operations to verify its projection. 40 C.F.R. 51.166(b)(21)(v) (1993).[9]

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[9] The agency explained that its "extensive experience with electric utilities, and the generally similar nature of operations within this source category, provide EPA an adequate basis on which to predict future actual emissions from such units in most cases." 56 Fed. Reg. 27630, 27631

Having formally proposed the regulatory changes in the *CMA* Exhibit B in 1996, 61 Fed. Reg. 38250 (July 23, 1996),[10] EPA rejected them in a 2002 NSR rulemaking. EPA reiterated concerns it expressed in 1996 about the effects of such a change on the PSD program, and noted comments from States and others that the proposal would frustrate SIP administration, lead to overconsumption of PSD increments and to nonattainment backsliding, and "virtually eliminate NSR in most modification cases." 67 Fed. Reg. at 80205. EPA declined to adopt Exhibit B, concluding it "could lead to unreviewed increases in emissions that would be detrimental to air quality" and "make it difficult to implement the statutory requirements for state-of-the-art controls." *Id.* Duke and other utility petitioners moved to reopen the D.C. Circuit *CMA* proceedings, which were consolidated with challenges to the 1992 and 2002 PSD regulations.

8. D.C. Circuit Proceedings. On June 24, 2005, the D.C. Circuit upheld the 1980 PSD modification regulations against

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(June 14, 1991) (proposed rule). EPA distinguished the different tests used under NSPS and PSD, 57 Fed. Reg. at 32316, and discussed the test under 1980 PSD regulations in detail, *id.* at 32316-18.

[10] In the 1996 notice, EPA explained that the effect of the Exhibit B language would be to "eliminate a source's level of operations as a factor when determining whether a proposed change will result in an increase," and that if "[p]ast and future levels of utilization of the source are completely disregarded * * * an existing source could make any change so long as the change does not significantly increase the source's hourly potential emissions rate." 61 Fed. Reg. at 38269. Such an approach would allow a source to avoid PSD for physical changes that allow it to operate "at much higher levels (*e.g.*, more hours per day or week) than it had in the past," with the result that "actual emissions (measured in tpy [tons per year]) could more than double due to the increase in utilization even though hourly potential emissions remain the same" – a "particular concern" in the case of "older sources," of which the impact had "never been assessed." *Id.* EPA also determined that Exhibit B's rejection of an actual emissions test might "conflict" with the 1990 Amendments' NNSR provisions, under which "offsetting emissions reductions .* * * must be calculated in terms of *actual* emissions." *Id.* at 38269 n. 31 (emphasis added) (citing 42 U.S.C. 7503(c)). See *supra*, pp. 15-16.

the revived challenges of a utility industry coalition that included Duke. *New York*, 413 F.3d 3. The court rejected petitioners' argument that Congress, by incorporating into the PSD program the *statutory* definition of "modification" set out in the 1970 Act's NSPS provisions, intended to impose for the statutory PSD program a "modification" definition set forth in EPA's pre-1977 NSPS *regulations*, which gauged modifications by increases in hourly emissions rate. 413 F. 3d at 19-20; see also *id.* at 18 (noting that the industry petitioners "challenge the 1980 rule's definition of modification in the NSR context to the extent that it differs from the NSPS definition"). The D.C. Circuit explained that it "ha[d] (naturally) required indications in the statutory language or history to infer that Congress intended to incorporate into a statute a preexisting regulatory definition," and that, in the case of the 1977 PSD enactment, it found none. *Id.* at 20. The court also observed that when the PSD provisions were enacted in 1977, EPA's NSPS regulations contained two *different* and "possibly inconsistent" regulatory definitions for "modification," *id.* at 19,[11] and that the regulatory definitions for NSPS and EPA's 1974 administrative PSD program "already differed" at that point. 413 F.2d at 12. Noting that industry had made "no attack at all on the reasonableness of EPA's definition of modification for NSR (apart from its divergence from one of the 1975 NSPS definitions)" the court "reject[ed] this portion of industry's challenge to the 1980 and the 2002 rules." *Id.* at 20.

The *New York* court returned to the statutory "modification" definition in striking down portions of EPA's 2002 regulations exempting certain projects from NSR "even if the change increases the source's net actual emissions."

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[11] NSPS regulations in place in 1977 contained one provision (in place with minor changes since 1971, see 36 Fed. Reg. 24876, 24877 (Dec. 23, 1971)), with language tracking the statutory definition, 40 C.F.R. 60.2(h) (1976), and another prescribing an hourly rate standard, *id.* 60.14(b). See 40 Fed. Reg. 58416, 58416-17 (Dec. 16, 1975).

413 F.3d at 38. Examining the text of the definition and other PSD provisions, the court held that the "plain language of the CAA indicates that Congress intended to apply NSR to changes that increase actual emissions instead of potential or allowable emissions." *Id.* at 40.

B. Factual Background and Proceedings Below

1. Duke's Plant Modernization Program. This case concerns significant rehabilitation projects at eight of Duke's plants in the Carolinas. See Pet. App. 26a-28a. The units began service between 1940 and 1975, and had, by the 1980s, become so debilitated that a number were removed from Duke's installed generating capacity because "they no longer [could] provide reliable service." *State ex. rel. Utilities Comm. v. Eddleman,* 358 S.E.2d 339, 348 (N.C. 1987). Duke's CEO testified to South Carolina utility officials about the "geriatric condition" of Duke units, JA 201, stating they were "no longer reliable because of their age and condition," and that "[h]istorically, units of this age and condition would be retired and scrapped." Pet. App. 28a; JA 204; see *Eddleman,* 358 S.E.2d at 349 ("'Ordinarily, plants of this age and condition are retired and replaced by new capacity.'") (quoting and upholding N.C. Utilities Commission finding regarding the Duke plants).

In 1985, Duke embarked on what it called its "Plant Modernization Program" (PMP), aimed at "refurbish[ing]" projects it had taken off line, JA 224, so they could "operate safely, reliably, and cost effectively for an additional 20 years." Pet. App. 28a; see JA 232. Duke's project manager described the modernization of one of the facilities, Unit 4 of the Buck Steam Station, as equivalent to taking a 1932 Ford and "rebuild[ing] it completely" so that it could run "from here [North Carolina] to Denver every day." U.S. Summ. J. Ex. 24 at 25 (Milton Starnes Dep. 25:16).[12] Duke's PMP

[12] Duke's prescribed "major rehabilitation" for its plants included, for example, replacement of "[m]ajor portions of the boiler water walls of the boiler superheater and of the drum circulation system" at Buck 4, as well

strategy was to "[c]apitalize all expenditures" of PMP, JA 230, with "rehabilitation and upgrading" projects completed over a number of years to make "the extended operating life of the rehabilitated units a cost-effective alternative to the addition of new capacity." JA 232.

Duke's target for PMP projects was improving a unit's availability for service to a range of 80-85%. JA 230. But no such heavy utilization was needed to yield a significant increase in emissions. Duke's expert testified that the Buck 4 unit, which did not operate at all for 10 years prior to and during the PMP, would need to operate for only 151 hours – less than seven days – to increase sulfur dioxide emissions by 40 tons per year, the threshold for a significant increase under the PSD regulations,[13] while the United States' expert projected that Buck 4's post project emissions would increase by 873.2 tons per year.[14]

2. District Court Proceedings. In December 2000, the United States filed an enforcement action against Duke pursuant to Sections 113(b) and 167 of the CAA, charging that Duke had violated the Act by engaging in 29

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as manufacture and installation of new generator coils and replacement of condenser tubes (JA 206-07); for Buck 3, complete "rewinding" of a "condemned" generator rotor "too dangerous to operate under circumstances" as well as "major replacements of the boiler" (JA 206); and, for Allen 2, "modifications and upgrading" of the boiler, replacement of a precipitator, replacement feed water heaters, and a "completely rewound" generator stator with "new copper coils, insulation, and the works" (JA 206). Duke was "counting on total rehabilitation, or there was no way" its older units could make it into the 21st Century. JA 210.

[13] U.S. Ex. 96 (Ex. FCG-5 to Expert Report of Frank C. Graves).

[14] JA 445 (Comparison Test 2). Buck 4 resumed commercial operations on January 1, 1995, CA4 JA at 790, without having undergone NSR and without any PSD pollution controls. EPA's online Unit Emissions Report for Buck 4 reports that, in 2003, Buck 4 operated 5,132 hours and emitted 1,095 tons of SO_2. See http://cfpub.epa.gov/gdm/index.cfm (quick reports, unit level emissions report, acid rain database, facility name "Buck," Unit ID "7") (last visited July 15, 2006). Unlike the parties in *Puerto Rican Cement* and *WEPCo*, Duke never sought an applicability determination.

"modifications" without obtaining PSD permits required under the Act and the applicable state implementation plans.[15] Petitioners intervened as plaintiffs. Plaintiffs submitted that Duke's extensive refurbishments resulted in large increases in emissions and constituted modifications under the governing PSD regulations.[16] Among other defenses, Duke countered that a PSD "increase" could not occur absent an increase in hourly emissions rate. Pet. App. 58a-59a.

The district court sided with Duke, and concluded that the "PSD statutory definition [of modification] incorporated not only the NSPS statutory definition of modification, but also the regulations implementing the NSPS program," Pet. App. 35a, see *id.* 67a, and, further, that Duke's post-PMP emissions had to be calculated by "assuming the same pre-project" hours of operation, meaning that "only if the project increases the hourly rate of emissions will there be an annual emissions increase." *Id.* 59a-60a. Although the PSD regulations require comparison of annual, rather than hourly emissions, the court reasoned that consistency could be achieved by "annualizing" the hourly rates -- *i.e.*, assuming that the plant would operate the same pre-project number of hours, even for changes

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[15] This is one of a number of NSR enforcement cases involving major renovation projects at older coal-fired power plants. See, *e.g.*, *United States v. Cinergy*, 397 F. Supp. 2d 1025 (S.D. Ind. 2005), *appeal pending* (7th Cir. No. 06-1224); *United States v. East Kentucky Power Co-op.*, Civ. No. 04-34 (E.D. Ky.) (filed 2004); *United States v. American Elec. Power Serv. Corp.*, Civ. No. C2-05-360 (S.D. Ohio) (filed 2005). Because those sources account for a large share of emissions of pollutants such as sulfur dioxide (SO_2) and nitrogen oxides (NOx), see, *e.g.*, General Accounting Office, *Air Pollution Emissions from Older Electric-Generating Units*, No. GAO 02-709, 2-3, 20-21 (2002); Jonathan Levy and Jack Spengler, Health Benefits of Emissions Reductions from Older Power Plants, 9 RISK IN PERSPECTIVE 1 (2001), and because BACT typically reduces emissions dramatically, see 71 Fed. Reg. 9866, 9871 (Feb. 27, 2006), NSR enforcement carries substantial benefits for air quality and public health.

[16] In 1982, EPA approved North and South Carolina's incorporation of the 1980 PSD regulations into their respective SIPs, 47 Fed. Reg. 7836 (Feb. 23, 1982) (NC); 47 Fed. Reg. 6017 (Feb. 10, 1982) (SC).

whose very purpose was to support increased operations. The court found support for an hourly rate test in the regulatory language providing that increases in "hours of operation" would not count as "physical changes" or changes in a source's "method of operation." *Id.* 58a-59a. Plaintiffs stipulated that Duke's refurbishments would not cause a PSD-triggering "net emissions increase" under the district court's hourly rate test, and based on that stipulation, the district court entered final judgment for Duke. Pet. App. 87a.

3. Fourth Circuit Proceedings. On June 15, 2005, the Fourth Circuit affirmed the judgment for Duke. It did not adopt the district court's regulatory ratification theory. Instead it reasoned that "because Congress mandated that the PSD definition of 'modification' be identical to the NSPS definition of 'modification,' the EPA cannot interpret 'modification' under the PSD inconsistently with the way it interprets the term under the NSPS." Pet. App. 11a (footnote omitted). The panel relied on *Rowan*, 452 U.S. 247, a case it had ordered the parties to brief after oral argument. Pet. App. 11a-12a n.4, 21a. The Fourth Circuit read *Rowan* to teach that "when Congress itself provided 'substantially identical' statutory definitions of a term in different statutes, the agency charged with enforcing the statutes could not interpret the statutory definitions 'differently.'" *Id.* (quoting 452 U.S. at 257); see Pet. App. 14a (concluding that Congress "intended the statutory definitions of 'modification' in the PSD and NSPS provisions to be interpreted identically"). Finding that Congress had in this way "'directly spoken to the precise question at issue,'" Pet. App. 11a n.3 (quoting *Chevron*), the court declared that "the language and various interpretations of the PSD regulations, on which the district court partially based its holding and which the parties exhaustively discuss, are largely irrelevant to the proper analysis of this case." *Id.*

In a footnote, the Fourth Circuit addressed its power to resolve the case on these grounds, stating that while Section 307(b) barred it from passing on the "validity" of the PSD regulations, the district court had shown that the regulations

"can be interpreted consistently with pre-existing principles – the NSPS regulations," and that "the statute" required the PSD rules to be so construed. Pet. App. 15a n.7.

4. Rehearing Petitions in *New York* and this Case. The D.C. Circuit's *New York* decision was handed down nine days after the decision in this case. In upholding the 1980 PSD regulations, the D.C. Circuit acknowledged the Fourth Circuit's decision, but held that the petitioners had waived the argument that EPA "must use identical regulatory definitions of modification across the NSPS and NSR programs." 413 F.3d at 20. The Utilities Air Regulatory Group (UARG), of which Duke is a member, and which was represented in *New York* by Duke's Fourth Circuit counsel, sought panel and en banc rehearing in *New York*, arguing that "[t]he statutory construction argument addressed and resolved by the Fourth Circuit in *Duke Energy* was the same one [UARG] presented in this case: the proper interpretation of CAA § 169(2)(C), the provision of the Act defining 'construction' for purposes of PSD." Pet. for Reh., D.C. Cir. No. 02-1387 at 13 (Aug. 8, 2005). The D.C. Circuit denied rehearing on December 9, 2005. 431 F.3d 801. No party petitioned for certiorari.

Petitioners and the United States sought rehearing in the Fourth Circuit, pointing both to the D.C. Circuit's ruling upholding the 1980 regulations and to its reading of the PSD provisions to *require* an actual emissions test for PSD. Those petitions were denied on August 30, 2005.[17] This Court granted certiorari on May 15, 2006.

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[17] EPA then issued a notice proposing to amend its regulations to establish, for Electric Generating Units, a "uniform emissions test nationally under the NSPS and NSR programs[.]" 70 Fed. Reg. 61081, 61083 (Oct. 20, 2005). While it "disagreed" with the *Duke* decision, and noted "differences" between NSPS and PSD precluding an identical modification test for both, EPA considered the need for changes "apparent" due to the Fourth Circuit's ruling. *Id.* at 61081, 61083 & n.3.

SUMMARY OF ARGUMENT

In deciding this case based on a statutory "mandate" that EPA use identical regulatory tests for NSPS and PSD modifications, the Fourth Circuit exceeded express statutory limits upon its authority. Section 307(b) of the Act, in the clearest possible terms, provides that review of national CAA regulations be obtained only in the D.C. Circuit, by petition for review filed within 60 days, and that matters reviewable in this manner "shall not" be subject to judicial review in enforcement proceedings such as this one.

The Fourth Circuit's decision is the paradigm of the broad, facial, nationally significant ruling that Congress assigned to the D.C. Circuit – exclusively. The court of appeals nowhere found, and in the circumstances *could not* have found, that the regulations promulgated in 1980 and 1992 lulled prospective litigants into believing that EPA had adopted PSD regulations identical to the NSPS regulations, or that EPA had adopted a "maximum hourly rate" test for PSD. The PSD rules on their face differ markedly from the NSPS rules in numerous significant respects, including their measurement of increases by "actual emissions" in "tons per year," and their provisions for "netting." EPA's 1980 preamble explained that these features of the rules represented a significant departure from the prior, potential emissions-focused test and had been tailored to the distinct requirements of the PSD program, as elucidated by the D.C. Circuit in *Alabama Power*. The *CMA* litigation and "Exhibit B" – which sought to strip the "actual" emissions language from the regulations and insert new hourly rate language – show that regulated parties understood that EPA had adopted a new, PSD-specific approach to determining modifications. Review of any statutory challenge like that sustained by the Fourth Circuit plainly "could have been obtained" in the D.C. Circuit, and was barred in this enforcement case. 42 U.S.C. 7607(b)(2), (d)(7)(B), (e).

The Fourth Circuit's insistence that it was merely engaged in "interpretation" of the 1980 PSD regulations – significantly

undercut by its statement that their language was "irrelevant," and its failure to examine the regulatory text or accompanying Federal Register preamble at all – rings hollow. Whatever room the PSD regulations may leave for interpretation on other points, on the point relevant here – whether their definition of modification mirrors the NSPS regulations, and imposes an hourly rate test – the regulations are unambiguous, and they cannot be so "interpreted."

The court of appeals' extrajurisdictional foray compromised the interests in regulatory stability, orderly administration, and uniformity that Section 307(b) was enacted to protect. The court held the PSD regulations defective on a ground that was not presented to EPA in its NSR rulemakings and that was waived in the Section 307(b) review proceeding in the D.C. Circuit. Its ruling conflicts with D.C. Circuit rulings on both the validity of specific PSD regulations and on the meaning of the statutory provisions that are pivotal to multiple major CAA programs.

Having ventured into territory prohibited to it by Section 307(b), the Fourth Circuit seriously misapprehended the substance of the Act. EPA's regulatory standard for PSD modifications adheres to the text of the statutory modification definition – which broadly embraces "any physical change" that "increases the amount of any air pollutant emitted" by a source – and to the D.C. Circuit's pathmarking construction of the PSD provisions in *Alabama Power*. As the D.C. Circuit has held, the Act unambiguously rules out an approach under which actual emissions increases resulting from a physical change are disregarded.

This Court's *Rowan* decision does not support the Fourth Circuit's reading of the Act. That case did not espouse the "effectively irrebuttable" presumption the court below took from it, but rested on a thoroughly conventional review of statutory text, purposes and history, which led to a conclusion that Congress had specifically intended the IRS to implement the particular statutes at issue through parallel regulatory standards. Here, there is no indication that Congress intended

or expected EPA to devise a uniform definition of "modification" without regard to the particulars of the different programs in which it must operate. This Court has directed that common statutory terms be read in context, and the Act's PSD provisions provide explicit support for EPA's definition of PSD emissions in terms of actual "tons per year." The D.C. Circuit, relying on the modification definition and other provisions of the PSD program, has held that EPA not only *may* but *must* measure PSD increases to capture *actual* increases in emissions, and must include in its PSD rules elements statutorily *forbidden* for NSPS.

The Fourth Circuit's mistaken conversion of the presumption of uniform usage into a peremptory iron law led it to impose on EPA a test for PSD modifications that would violate the PSD statute. By immunizing modernization projects that greatly "increase the amount" of pollution actually "emitted" by sources, the court's maximum hourly rate test would defeat the basic aim of the PSD enactment to assess and limit adverse impacts on local air quality.

ARGUMENT

I. SECTION 307(b) OF THE ACT PRECLUDED THE FOURTH CIRCUIT FROM REVIEWING THE STATUTORY VALIDITY OF EPA'S REGULATORY TEST FOR PSD MODIFICATIONS

The Fourth Circuit's theory that the PSD provisions' cross-reference to the Section 111(a)(4) definition of "modification" required that EPA's regulations on NSPS modifications and PSD modifications be identical involves precisely the kind of matter the Act reserves to the D.C. Circuit exclusively and that "shall not be" reached by a court in an enforcement action. 42 U.S.C. 7607(b)(2).

A. The Fourth Circuit Plainly Violated Section 307(b). Congress could not have been more explicit that statutory challenges to EPA regulations may be adjudicated exclusively in the D.C. Circuit on timely petition for review.

Section 307(b) provides that EPA regulations and other actions of national effect are reviewable "only" in that court, by petition filed within 60 days, and that actions reviewable by such a petition "shall not be subject to judicial review" in enforcement actions. See also 42 U.S.C. 7607(e). An exercise of Congress's recognized power to "prescribe the procedures and conditions under which, and the courts in which, judicial review of administrative orders may be had," the statute "is written in simple words of plain meaning and leaves no room to doubt the congressional purpose and intent." *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 335-36 (1958) (discussing Federal Power Act's review provision, 16 U.S.C. 825*l*(b)).[18] "[T]here is little room for doubt regarding congressional intent where, as here, the relevant statute speaks not only to the existence and nature of pre-enforcement review but also to the non-existence of enforcement-*cum*-review." *United States v. Ethyl Corp.*, 761 F.2d 1153, 1157 (5th Cir. 1985). In short, Section 307(b) means "exactly what it says." *Harrison*, 446 U.S. at 589.

Section 307 reflects Congress's considered – and reconsidered – judgment that limitations on the timing, scope, and forum for judicial review are of central importance to the implementation of this uncommonly complex statute. See *Alabama Power*, 606 F.2d at 1075. In 1977, after reviewing proposals to narrow Section 307's limitations, Congress instead expanded the grant of exclusive jurisdiction (while also enlarging the time for review and adding detailed requirements for EPA rulemaking). See *supra*, p. 8 & n.3. Congress deliberately called upon the D.C. Circuit's special expertise in superintending the administration of complex

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[18] See *F.C.C. v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 (1984) (discussing exclusive D.C. Circuit review of certain FCC orders, see 47 U.S.C. 402(a)); *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 136-137 (1977) (discussing Section 509(b) of Clean Water Act, 33 U.S.C. 1369(b)); *NLRB v. Cheney Cal. Lumber Co.*, 327 U.S. 385, 388 (1946).

regulatory statutes,[19] and promoted stability and uniformity by giving that court's decisions a definitive role in overseeing CAA implementation. See *City of Tacoma*, 357 U.S. at 336 (referring to "statutory finality" created by Federal Power Act's exclusive review provision); *Lubrizol Corp. v. Train*, 547 F.2d 310, 317 (6th Cir. 1975) (in Section 307(b), "Congress established a single, national forum whose decisions would be uniform and final, save for review by the Supreme Court"). Implementing the Act is an iterative process, in which both the D.C. Circuit and the EPA must construe the Act in light of D.C. Circuit precedent, subject to this Court's review. See *Dayton Power & Light Co. v. EPA*, 520 F.2d 703, 708 (6th Cir. 1975) (EPA regulations were "promulgated in response to" ruling of D.C. Circuit, which was "[c]learly * * * in the best position to determine whether the regulations are consistent with its order").[20] Section

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[19] See, *e.g.*, Henry J. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1310 (1975) (noting D.C. Circuit's "special importance for administrative law" in light of CAA's and other exclusive review provisions); *O'Donoghue v. United States*, 289 U.S. 516, 535 (1933) (The "courts of the District" are "in closer contact with, and more immediately open to the influences of, the legislative department, and exercise a more extensive jurisdiction in cases affecting the operations of the general government and its various departments" than other federal courts). In opposing the 1976 Administrative Conference proposal, later rejected by Congress, to limit the scope of exclusive review, EPA General Counsel G. William Frick emphasized the D.C. Circuit's "obvious expertise in administrative law matters," its "sensitivity to Congressional mandates," and its "thorough[] familiar[ity]" with the CAA, a "very complex statute – and with its equally complex legislative history." 41 Fed. Reg. at 56769. See *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 859 (D.C. Cir. 1979) (reviewing, pursuant to Section 307, challenges of "baroque complexity" to "highly complex" PSD rules promulgated by EPA "besieged on all side by vocal private and public interest groups").

[20] Because agencies must adhere to precedent grounded on unambiguous statutory commands, *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2700 (2005); *Chevron*, 467 U.S. at 843 n.9, Section 307(b) protects EPA from the quandary presented (as here) by conflicting judicial readings of those commands.

307(b) ensures that a court reviewing complex decisions of national significance will have before it the rulemaking record upon which to evaluate the agency's actions. See 42 U.S.C. 7607(d)(7)(A) (defining "record for judicial review"); *Lubrizol Corp.*, 547 F.2d at 316; cf. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744-45 (1985) (discussing reasons for initial court of appeals review under Hobbs Act).

By barring other courts from deciding matters that "could have been" resolved in the D.C. Circuit, the Act gives parties of all stripes reason to present their inevitably conflicting theories about the Act's meaning in the same time and place. And by barring review of such matters in enforcement actions, the Act expresses Congress's strong preference that regulations restricting the emission of harmful pollutants into the air should be followed – or promptly challenged – but not disobeyed in hopes that the local court in which enforcement proceeds will invalidate them. See S. Rep. No. 91-1196 at 38 (the issue before courts in public or citizen enforcement actions is the "factual one of whether there had been compliance"); *Hawaiian Elec. Co. v. EPA*, 723 F.2d 1440, 1447 (9th Cir. 1984) (challenge to 1980 PSD modification regulations barred by Section 307(b), a "valid mechanism to prevent continual piecemeal attacks on the same EPA action"); see also *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 323 n.2 (1982) (discussing Clean Water Act enforcement). The effect of a D.C. Circuit ruling that CAA regulations are flawed is a remand to EPA, see *Florida Power & Light Co.*, 470 U.S. at 744, rather than, as here, a disruptive intercircuit conflict over the validity of *national* regulations and over the meaning of the Act.

Section 307's multiple prohibitions against entertaining in other fora challenges that could have been brought by petition in the D.C. Circuit squarely applied here. Any claim that the "plain language of the Clean Air Act" mandated that EPA adopt "identical[]" modification regulations for the NSPS and the NSR programs (Pet. App. 14a), was a "facial" challenge to the regulations, a pure question of law that fell in the very

heartland of the D.C. Circuit's exclusive review authority. See *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 479 (2001) (pointing to the "special judicial-review provision of the CAA, 42 U.S.C. § 7607(b)" in holding that Court, reviewing a D.C. Circuit decision, could address issue that was "purely one of statutory interpretation"). Nothing about the Fourth Circuit's abstract statutory theory depended on EPA's *application* of its regulations to particular circumstances. Cf. *Puerto Rican Cement*, 889 F.2d at 296-98. EPA's adoption in 1980 – as in *all* generations of its PSD and NNSR regulations – of a test for modifications that differs in explicit and decisive ways from the agency's NSPS modification test constituted "[a]ction of the Administrator with respect to which review could have been obtained under paragraph (1)" of Section 307(b), 42 U.S.C. 7607(b)(2).[21]

Nor could anyone have believed, in 1980, that EPA had established PSD regulations that were identical to its NSPS regulations. The marked difference between the modification tests – "hourly rate" for NSPS and "actual, annual" for NSR – has been a staple of judicial and academic descriptions of the NSPS and PSD regulatory regimes.[22] The PSD regulations'

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[21] See H.R. Rep. No. 95-294 at 322 ("[U]nless a petitioner can show that the basis for his challenge did not exist or was not reasonably to be anticipated before the expiration of 60 days, the court of appeals is without jurisdiction to consider a petition filed later than 60 days after the publication of the promulgated rule.").

[22] See *New York I*, 413 F.3d at 18 ("While the NSPS regulatory definition of modification allegedly focuses on the hourly rate of emissions, the NSR definition focuses on net emissions increases measured in tons per year"); *WEPCo*, 893 F.2d at 913, 915 (contrasting NSPS and PSD regulations); *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 875 (S.D. Ohio 2003) (rejecting claim that PSD regulation provides for "hourly emissions rate test" and finding it "abundantly clear" that it "focuses on ... total annual emissions" whereas NSPS regulation "focuses on the maximum potential hourly emissions"); *United States v. S. Ind. Gas & Elec. Co.*, 245 F. Supp. 2d 994, 998 (S.D. Ind. 2003). See also 57 Fed. Reg. at 32316 ("Emissions increases for NSPS purposes are determined by changes in the hourly emissions rates at maximum physical capacity," whereas "the

"actual emissions" metric and their references to "tons per year," 40 C.F.R. 51.166(b)(1)(i)(a), (21)(ii), (23)(i), nowhere appear in the NSPS regulations, which measure emissions increases by changes in hourly rates, in "kg/hr." *Id.* 60.14(b). The 1980 PSD regulations specifically require that a source's pre-change emissions be "calculated using the unit's actual operating hours," 40 C.F.R. 51.166(b)(21)(ii), while the NSPS regulations contain no such provision. The NSPS regulations contain elaborate procedures, absent from the PSD regulations, for calculating hourly emission rates. 40 C.F.R. 60.14(b) (1), (2) (discussing emissions factors, material balances and testing procedures). See also 40 Fed. Reg. at 58420 (Appendix C). The equally elaborate netting provisions in the PSD regulations, *e.g.*, *id.* 51.166(b)(3) – linked to the statute's distinctive focus on large sources' effects on local air quality, see *Alabama Power*, 636 F.2d at 401 – are absent from the NSPS regulations, as are the PSD "significance" thresholds, measured in "tons per year." 40 C.F.R. 51.166(b)(23)(i). These and other differences provided vivid notice to prospective litigants that EPA, in 1980, did not espouse the view that its PSD and NSPS modification regulations had to be, or were, the same. The only avenue for a claim that EPA had thereby violated "the plain language of the Clean Air Act," Pet. App. 14a, was a petition for review in the D.C. Circuit.

The 1980 preamble provided equally vivid notice. Highlighting the significance of its new emissions increase test for PSD, EPA announced that it had "shifted the focus of its regulatory definitions from 'potential to emit' to 'actual emissions.'" 45 Fed. Reg. at 52700; see *New York*, 413 F.3d at 14 (discussing this shift). Explaining this departure from

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NSR regulations examine total emissions to the atmosphere * * * determined by changes in annual emissions as expressed in tons per year (tpy)."); Arnold W. Reitze, Jr., STATIONARY SOURCE AIR POLLUTION LAW 170 (2005)) ("Unlike NSPS, which are based on a change in the hourly rate of emissions, PSD applicability is triggered by significant changes in total annual emissions, expressed in tpy.").

the 1979 proposed regulations, under which PSD would have been triggered by increases in "a unit's potential to emit the pollutant," 44 Fed. Reg. at 51948, EPA pointed to *Alabama Power*'s mandate to address "actual" impacts on air quality. 45 Fed. Reg. at 52700. EPA also explained that the shift to an actual emissions test was also necessary to prevent malfunction and misuse of the netting mechanism. *Id.*; see also *id.* at 52713 (increased emissions "due to increased hours of operation or capacity utilization" occurring after the baseline period count against increment).

That EPA had adopted a new modification standard specially tailored to the PSD provisions was not lost on the agency's readership. The General Motors petitioners in *CMA* complained vociferously that under the new regulations PSD would apply to projects that "result in a significant increase in *actual* emissions, even though the source's net *capacity* to emit remains constant or declines." Br. at 5-6 (D.C. Cir. No. 79-1112) (emphasis in original). And Exhibit B to the *CMA* settlement proposed to "delet[e]" the word "actual" from the 1980 regulations, and to substitute a test that would have exempted all physical changes from PSD review in the absence of a net increase in "PTE [potential to emit] (as calculated in terms of pounds of pollutant emitted per hour)." 67 Fed. Reg. at 80205 (quoting Exhibit B).[23]

B. The Fourth Circuit's "Interpretation" of the 1980 PSD Regulations Contravened Section 307(b) and Is Foreclosed By the Regulatory Text.

In response to objections that EPA's regulations were subject to exclusive review in the D.C. Circuit, the Fourth Circuit stated it was merely addressing an "interpretation" of EPA's 1980 PSD regulations, which in its view could be "interpreted consistently with pre-existing principles," namely

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[23] The considerations just summarized utterly banish from this case the kind of fair notice concerns that might be raised by some applications of Section 307(b)(2). See *Adamo Wrecking*, 434 U.S. at 283 n.2.

"the NSPS regulations." Pet. App. 15a n.7.[24] The court of appeals did not itself explain how such an interpretation could be accomplished, instead pointing to the district court's opinion, and insisting that a "choice of this interpretation – as required under the statute – over the EPA's interpretation is not an invalidation of those regulations." *Id.*[25]

But the Fourth Circuit's own opinion makes plain that the court strayed far into forbidden D.C. Circuit terrain. Indeed, the court confided that, *because* its ruling was based upon the statute under the first prong of *Chevron*, "the language and various interpretations of the PSD regulations" were "largely irrelevant to the proper analysis of this case." Pet. App. 11a n.3. The court went on wholly to ignore the central tools for

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[24] No genuine question is presented here of Section 307(b)(2)'s effect on the authority of courts in enforcement actions to review agencies' interpretations of their own regulations, since the Fourth Circuit's ruling was by any measure a clearly forbidden, facial, *statutory* invalidation of national CAA regulations. By its terms, Section 307(b)(2) does not turn on "invalidation" versus "interpretation" of regulations, but instead on whether judicial review "could have been obtained" under Section 307(b)(1), which authorizes review of some agency interpretations of their own regulations. See *Harrison*, 446 U.S. at 586-94 (Section 307(b)(1) provides for court of appeals review of NSPS applicability determination); *Puerto Rican Cement*, 889 F.2d at 296-98, 299 (reviewing EPA's application of PSD regulations to the petitioner's facility).

[25] There was an odd mismatch between the court of appeals' reading of what "the statute" required – identity between NSPS and PSD modification regulations mandated by the common statutory definitions – and its rather casual endorsement of *the district court*'s analysis, which had relied on provisions of the PSD regulations, relating to netting and "significance" thresholds, (Pet. App. 64a-65a & n.22) that are entirely absent from the NSPS regulations *and thereby violate the Fourth Circuit's reading of the CAA's "mandate."* See also *id.* at 64a (district court's insistence that its interpretation did *not* make the PSD and NSPS tests "indistinguishable"). The Fourth Circuit left unexplained, as well, how the 1992 amendment to the PSD regulations test for emissions increases, unaddressed by the district court and unchallenged by Duke or any other utility despite its patent difference from the NSPS increase test, *New York*, 413 F.3d at 17, could be "interpreted" to conform its statutory theory.

interpreting regulations, such as the regulatory text, *Christensen v. Harris County*, 529 U.S. 576, 587-88 (2000), and the rulemaking preamble. Even when regulatory text permits alternative readings, a court has no warrant to overturn an agency's interpretation merely because the court concludes the text "can be interpreted" differently.[26] A species of "interpretation" that deems regulatory language and the agency's contemporaneous Federal Register explanation "irrelevant" would, among other defects, nullify the explicit restrictions imposed by Congress in Section 307(b), and open the door to all manner of congressionally prohibited collateral attacks. The Fourth Circuit's *actions* consisted of a statutory invalidation of national EPA rules, a paradigmatic violation of Section 307(b) and (e).

In any event, the court was entirely wrong in concluding that the PSD modification regulations "can be interpreted" to be identical to, or the functional equivalent of, the NSPS regulations. As we have just explained, the PSD regulations nowhere provide for, and cannot accommodate, the maximum hourly rate test imposed by the courts below. They were deliberately crafted to capture net increases in "actual emissions," measured in "tons per year," whether or not there is an increase in maximum hourly emissions rates or other measure of capacity to emit, and the two sets of regulations differ in numerous other obvious and fundamental ways. Section 307(b) barred the Fourth Circuit from doing what Duke and the other *CMA* challengers unsuccessfully tried to do: "delete" the PSD regulations' reliance on "actual" emissions, and amend the regulation to add a "potential to emit" test under which no PSD "modification" could be found absent an increase in hourly emissions rates. *Supra*, p. 12-13.

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[26] An agency's interpretation merits "substantial deference," *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994), and "control[s]" unless "'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citations omitted). See *Puerto Rican Cement*, 889 F.2d at 297.

The basis for the Fourth Circuit's alternative "interpretation" of the PSD regulations was the district court's opinion, which relied (Pet. App. 59a-60a) on the provision stating that "[a] physical change or change in the method of operation shall not include" an "increase in the hours of operation or in the production rate * * *" 40 C.F.R. 51.166(b)(2)(iii)(*f*).[27] The court understood this provision to mean that even when a plant undergoes an extensive physical change – a "modernization" – the very purpose of which is to allow it to operate dramatically more hours, regulators must *pretend* that hours of operation and production rates will remain unchanged. See Pet. App. 58a-59a ("in calculating post project emissions levels the hours and conditions of operation must be held constant").[28]

This reading is manifestly wrong. By providing that an

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[27] The court of appeals (Pet. App. 15a n.7) also cited statements by Edward Reich, Director of EPA's Division of Stationary Source Enforcement, in which Reich stated that increased hours of operation would not suffice to trigger PSD. JA 28, 35. Reich's statements on the increased hours exemption do not address situations where a physical change enables increased hours of operation, and, to the extent they are construed to exempt the resulting emissions from the definition of emissions "increase" (rather than "change"), are flatly inconsistent with the text of and preamble to the 1980 regulations, and with EPA's application of them since Reich's statements, see, *e.g.*, JA 294; 57 Fed. Reg. at 32328. In *Puerto Rican Cement*, the court properly rejected a similar reliance on the "deviant" reading of the PSD regulations in by an EPA official, observing that the statements were inconsistent with "EPA materials written both before, and after," and that "[n]o large agency can guarantee that all its administrators will react similarly, or interpret regulations identically, throughout the United States." 889 F.2d at 298-99.

[28] The district court claimed to fit an hourly rate test into the PSD rules by "annualizing" it (*e.g.*, Pet. App. 64a), a step the court considered necessary to conform to the regulations' numerous references to annual emissions. The regulations, however, make no mention of annualization of hourly rates, and the "net emissions increase" definition encompasses annual emissions precisely *because* it references "actual emissions," which are defined by "tons per year" of emissions. 40 C.F.R. 51.166(b)(3)(i), (b)(21).

increase in hours or production rates does not constitute a "*physical change or change in the method of operation,*" what the regulations plainly mean is that a modification will not be found in the absence of a physical change. The fact that an increase in operating hours does not alone suffice to meet the *first* prong of the two-part modification test in no way suggests that increases in actual emissions caused by a physical change should be ignored. See *Ohio Edison*, 276 F. Supp. 2d at 876 (exemption "clearly" limited to "an increase in hours of operation unaccompanied by physical construction to the unit itself"). The question of what counts as an increase is addressed by the *second* prong of the modification test, defining a "significant emissions increase," which, far from ignoring hours or production rates, requires consideration of both. 40 C.F.R. 51.166(b)(21)(ii).

Properly understood, the regulations ensure that prosaic business decisions that might appear to fall within the statute's broad references to "any physical change" or "any * * * change in the method of operation" do not trigger PSD requirements. As EPA explained in 1980, the exemption derived from the agency's decision that the regulatory definition of modification "should focus on changes in 'actual emissions,'" and that:

> While EPA has concluded that as a general rule Congress intended any significant net increase in such emissions to undergo PSD or nonattainment review, it is also convinced that Congress could not have intended a company to have to get an NSR permit before it could lawfully change hours or rate of operation. Plainly, such a requirement would severely and unduly hamper the ability of any company to take advantage of favorable market conditions. The emphasis of the relevant statutory provisions on 'construction' strongly supports EPA's interpretation of Congress' intent. See, *e.g.*, section 165(a), 42 U.S.C. 7475.

45 Fed. Reg. at 52704. EPA's rationale, like the regulatory text, demonstrates that the exemption was not meant as an

instruction to engage in the counterfactual exercise in measurement engaged in by the district court.

Because "modification" is a dual test under the statute – requiring a "physical change" and an "increase" in the amount of pollutant emitted by a source – the PSD regulations broadly allow a facility to increase its hours of operation or production rates in response to business needs without triggering PSD. But, under PSD, if a dilapidated source is physically rebuilt to expand operations, the additional pollution that results from the expanded use of the facility is considered in determining whether PSD applies, because both of the statutory criteria are satisfied. See 57 Fed. Reg. at 32328 ("[A]n increase in emissions attributable to an increase in hours of operation or production rate which is the result of a construction-related activity is not excluded from [PSD and NNSR] review.") (citing *WEPCo*, 893 F.2d at 916 n.11, and *Puerto Rican Cement*, 889 F.2d at 298).

C. The Ruling Below Produced the Very Disarray Section 307(b) was Enacted to Prevent.

The Fourth Circuit's ruling struck a serious and wholly gratuitous blow to a complex body of case law and agency regulations that emerged from 25 years of rulemaking and judicial review under CAA Section 307(b) and (d). The EPA regulations the Fourth Circuit found wanting were themselves enacted in large part to conform to a D.C. Circuit decision (*Alabama Power*) that had construed the PSD provisions of the Act not only to permit but to *require* a distinctive regulatory test for modification – a test that reflects statutory imperatives peculiar to the NSR programs and that make it fundamentally different from the NSPS regime. Without the benefit of the administrative record on which Congress commanded that EPA's national policy decisions be reviewed, 42 U.S.C. 7607(d)(2)-(7), the court struck down EPA's regulatory test on statutory grounds that had not even been presented to the agency in any of the various PSD rulemakings, *id.* 7607(d)(7)(B), or presented to the D.C.

Circuit in the *CMA/New York* proceeding.

The Fourth Circuit's broad statutory ruling produced just the sort of "inconsistent adjudications," *Ethyl Corp.*, 761 F.2d at 1156, Section 307(b) was enacted to prevent, and its decision was at odds with decisions of the very court Congress assigned exclusive authority to make determinations of this kind. *Alabama Power* and *New York* are utterly inconsistent with the "mandate" the Fourth Circuit discerned from the Act. See also *New York v. EPA*, 443 F.3d 880, 889 (D.C. Cir. 2006) (*New York II*) (in Section 307(b) challenge to 2003 NSR rules, stating that "[t]o the extent industry intervenors [including Duke] rely on the NSPS regime to reargue their position that 'modifications' require an increase in maximum emissions rates, that issue was resolved in *New York I*, 413 F.3d at 19-20, 40"). If other courts can be persuaded (as they are being importuned) to brush aside Section 307(b), the Fourth Circuit's ruling will continue to invite collateral attacks on every generation of EPA's PSD and NNSR modification regulations (all of which differ in important ways from the agency's NSPS regulations). When it enacted and expanded Section 307(b), Congress sought to ward off just that result, recognizing that regulatory stability and national uniformity are particularly important in the CAA context, not least for States that incorporate regulations in their SIPs. See *Train v. Natural Resources Def. Council*, 421 U.S. 60, 87 (1975) (noting States' "reliance" on EPA's CAA implementing regulations).

II. EPA'S DEFINITION OF PSD MODIFICATIONS BY REFERENCE TO INCREASES IN ACTUAL, ANNUAL EMISSIONS IS CONSISTENT WITH THE ACT

The Fourth Circuit's ruling would warrant reversal even if there were no Section 307(b). EPA's decision to assess PSD "modifications" in terms of physical changes' net effect on a source's *actual*, *annual* emissions is entirely consistent with the Act and reasonable. The court below condemned it only by erroneous reliance on an exceptionally rigid presumption

that is unsupported by this Court's decisions. The court thereby imposed a test for PSD modifications that is itself contrary to the plain text and basic purposes of the statute – and to the decisions of the court of appeals with express authority to determine the validity of CAA regulations.

A. The Statutory Text Supports EPA's Approach.

An agency's construction of a statute it administers must be upheld if it is consistent with the "unambiguously expressed intent of Congress," and – to the extent the statute is ambiguous – "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 842-43. See 42 U.S.C. 7607(d)(9) (statutory standard of review of CAA regulations, including PSD regulations, *id.*, 7607(d)(1)(J)).

The plain language of the Act strongly supports the agency's approach. In promulgating the 1980 rules, EPA properly emphasized that plain text: "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emissions of any air pollutant not previously emitted" – observing that "the underlined words in the definition appear to refer to what the source is actually emitting at a particular time." 45 Fed. Reg. at 52700 (quoting 42 U.S.C. 7411(a), underlining added by EPA). EPA noted that *Alabama Power* had described the PSD provisions in terms that "like the section 111(a)(4) definition, suggest changes in actual emissions," and that the agency's regulatory definition was "consistent with the [D.C. Circuit's] view of section 111(a)(4)." *Id.* (citing 636 F.2d at 400-01).

EPA's definition of PSD modifications in terms of actual emissions is supported by statutory language defining "major emitting facilit[ies]" subject to PSD as sources "which *emit, or which have the potential to emit*," pollutants in specified annual amounts. 42 U.S.C. 7479(1) (emphasis added). This "juxtaposition * * * indicates that when Congress enacted the NSR program in 1977, it was conscious of the distinction

between actual and potential emissions." *New York*, 413 F.3d at 39 (citing *Alabama Power*, 636 F.2d at 353, which, based on this same text, concluded that "[p]lainly, the pollutants that sources 'emit' is a reference to some measure of actual emissions"). "If Congress had intended for 'increases' in emissions to be measured in terms of potential or allowable emissions, it would have added a reference to 'potential to emit' or 'emission limitations.'" *New York*, 413 F.3d at 40. Thus, "the plain language of the CAA indicates that Congress intended to apply NSR to changes that increase actual emissions instead of potential or allowable emissions." *Id.* [29]

EPA's decision to measure emissions increases in annual terms – in "tons per year" – is also firmly rooted in the text, which measures emissions for PSD coverage and exemption purposes in "tons per year." 42 U.S.C. 7475(b), 7479(1). See also *id.* 7602(j), (x) (NNSR source definition in terms of "tons per year" of emissions). In the 1990 amendments, Congress continued the NSR programs' reliance on actual, annual emissions. Congress enacted rigorous new NNSR thresholds based on actual annual emissions of pollutants, calibrated to the severity of the given area's pollution levels. See, *e.g.*, 42 U.S.C. 7511a(c) (major source thresholds for serious ozone areas of "50 tons per year"); 7511a(d) (for severe areas, "25 tons per year"); 7511a(e) (for extreme area, "10 tons per year"). The NSR provisions, in short, are plainly "concerned with increases in *total annual emissions*." *WEPCo*, 893 F.2d at 904 (emphasis added).

The PSD program protects local air quality largely through the increment mechanism (wholly absent from NSPS), and the "emphatic goal of the PSD provisions is to prevent those thresholds from being exceeded[.]" *Alabama Power*, 636 F.2d at 362. Increments are set by reference to a "baseline

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[29] See also 42 U.S.C. 7475(b) (exempting "an *expansion or* modification of a major emitting facility which is in existence on August 7, 1977" with "less than fifty tons per year" of "*allowable*" emissions from certain PSD obligations) (emphasis added); *Alabama Power*, 636 F.2d at 400 n.47.

concentration," 42 U.S.C. 7473, 7479(4), which "include[s] all emissions *actually being made* by major facilities." *Alabama Power*, 636 F.2d at 376 (emphasis added). EPA's definition of "significant net emissions increase" was meant to "establish as close a correspondence as possible" between PSD permitting requirements and activities that in fact "consumed increment." 45 Fed. Reg. at 52701. See also *id.* at 52721 ("both baseline concentrations and increment consumption should be based on actual air quality impacts"); *id.* at 52714 (increased pollution from existing sources not "grandfather[ed]" into baseline, but instead counted against increment). This choice was surely reasonable, if not statutorily mandated: Under the PSD statute, "all emissions are considered" in calculating increment consumption, *Alabama Power,* 636 F.2d at 381 (citing H.R. Rep. No. 95-564 at 151 (1977).[30] Exempting changes that significantly increase actual, annual emissions would frustrate States' ability to track and allocate increment in ways that reflect their policy choices regarding new development. See S. Rep. No. 95-127, pt. 98 at 31 (1977).[31]

Moreover, EPA's focus on actual emissions ensures that netting credits are conferred only for contemporaneous "decreases" in emissions that produce real air quality benefits. A test turning on capacity to emit would convert netting, designed to provide flexibility for projects whose overall effect is benign, into a program of exemptions for projects that in fact harm air quality. See 45 Fed. Reg. at 52700; 61 Fed. Reg. at 38269. That result would be especially perverse given that *Alabama Power* held netting to be statutorily

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[30] As explained in *Alabama Power*, Congress *rejected* proposals to make the baseline turn on "plant capacity in existence." See 636 F.2d at 380-81.

[31] A test exempting such projects from PSD review and BACT controls would allow "modernized" projects to consume increment otherwise available to other sources, see 45 Fed. Reg. at 52720, potentially barring a "major new source with state-of-the-art emissions controls" from locating in the area. 61 Fed. Reg. at 38270.

required for PSD, even though statutorily prohibited for NSPS, see *ASARCO*, 578 F.2d at 327-29, precisely *because* of the PSD provisions' distinctive focus on projects' actual effects on local air quality. 636 F.2d at 401.

EPA's use of actual emissions has the virtue of "coherence" and "consistency with" the PSD provisions' "primary purpose." See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). That purpose is reflected both in broad statutory aspirations, 42 U.S.C. 7470, and in the elaborate mechanics of the program. On every page, the statutory text confirms what *Alabama Power* emphasized: The PSD program is focused on assessing and limiting actual "effects" and "impacts" on air quality in the vicinity of the source.[32]

B. Congress's Use of the Same Statutory Definition of "Modification" for NSPS and the NSR Programs Provided No Basis to Invalidate the PSD Rules.

The Fourth Circuit found EPA's PSD regulations contrary to the Act only by using a decidedly *non*traditional "tool[] of statutory construction," *Chevron*, 467 U.S. at 843 n.11, *i.e.*, what it called an "effectively irrebuttable" presumption derived from *Rowan*. Pet. App. 17a. This conclusion was seriously misguided in multiple respects.

Rowan itself does not announce, or employ, any such rigid presumption. In that case, the Court considered the meaning

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[32] See, *e.g.*, 42 U.S.C. 7470(5) (requiring "careful evaluation" of any decision "to permit increased air pollution in any area"); 7472(a) & 7475(d) (heightened protection for specified Parks and wilderness areas); 7473 (increments); 7475(a)(2) (requiring hearing on "air quality impact of such source"); 7475(a)(6) (requiring analysis of "any air quality impacts projected for the area as a result of growth associated with such a facility"); 7475(a)(7) (requiring monitoring "to determine the effect which emissions from any such facility may have" on "air quality in any area which may be affected"); 7475(e)(1) (pre-permitting analysis of "ambient air quality at the proposed site"); 7475(e)(3)(B) (detailing requirements to assess "the effect of emissions from a proposed facility"); 7479(3) ("case-by-case," source-specific BACT requirement, "taking into account energy, environmental, and economic impacts").

of the statutory term "wages" as used in federal revenue laws. The relevant statutes set forth three definitions of that term – identical definitions governing contributions to the Social Security (FICA) and unemployment insurance (FUTA) programs, and a similar definition in the income-tax withholding statute. See 452 U.S. at 249 & n.2. Treasury regulations provided that employees' meals and lodging furnished for the "convenience of the employer" were not "wages" for purposes of the withholding statute, but were "wages" under FICA and FUTA. The Court described the question before it as whether the latter regulatory definitions were consistent with the agency's obligation to "'implement the congressional mandate in some reasonable manner,'" 452 U.S. at 252 (citation omitted), adding that the regulations were due "less deference" because promulgated under only a general grant of rulemaking authority, *id.* at 253.

The Court found in the history of the three statutes "strong evidence that Congress intended 'wages' to mean the same thing under FICA, FUTA, and income tax withholding." 452 U.S. at 255. That history revealed "congressional concern for 'the interest of simplicity and ease of administration,'" *id.* at 255-56 (quoting S. Rep. No. 77-1631 at 165 (1942)), and an intent "to coordinate the income-tax withholding system with FICA and FUTA." *Id.* at 257. "[O]ne of the means Congress chose" to pursue that end was "to base withholding upon the same measure – 'wages' – as taxation under FICA and FUTA," a term with a meaning known to be "'intentionally narrow and precise.'" 452 U.S. at 255-56 (quoting *Central Illinois Pub. Serv. Co. v. United States*, 435 U.S. 21, 31 (1978)). See also 452 U.S. at 254 (noting agency's "acknowledgment" that benefits at issue were not "income," and that *Central Illinois* had held "wages" to be a "narrower concept" than "income"). The Court found it "extraordinary" that "a Congress pursuing this interest" would have intended, "without ever saying so, for identical definitions to be interpreted differently." *Id.* at 257. It noted, as well, that the IRS had first adopted parallel regulations, only to later change

the FICA/FUTA rules "without explanation." *Id.* at 259, 260.

Rowan itself never endorsed the extremely strong and general "presumption" the court of appeals took from it. In reaching its decision in that case, the Court analyzed the text and history of the relevant statutes and its own prior construction of the term "wages," found indications that Congress had intended the agency to adopt identical definition of "wages," and highlighted Treasury's wholesale failure to explain its decisions. Nothing in *Rowan* suggests that an inference created by Congress's use of identical or similar definitions is *ever* "irrebuttable" (Pet. App. 17a) by reference to the particular statutory contexts in which the terms are used. Nor has this Court ever cited *Rowan* as establishing any such overbearing canon of construction. In the 25 years since *Rowan* was decided, this Court has cited it only once, in *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982), decided the same Term, and there only for the proposition that Treasury regulations promulgated under general rulemaking authority receive less than full deference.

This Court's precedent, in fact, strongly refutes the Fourth Circuit's acontextual canon. The presumption of uniform usage "'is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.'" *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 (2004) (citations omitted). Far from establishing any irrebuttable presumption, this Court has always "recognize[ed] the controlling significance of context," *Wachovia Bank, Nat'l Assoc. v. Schmidt*, 126 S. Ct. 941, 948-49 (2006), in construing common statutory terms.[33]

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[33] See, *e.g.*, *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213 (2001); *Concrete Pipe & Products of Cal., Inc. v. Constr. Lab. Pension Trust for S. Cal.*, 508 U.S. 602, 634 (1993); *Erlenbaugh v. United States*, 409 U.S. 239, 245 (1972); *Lee v. Madigan*, 358 U.S. 228, 231 (1959); *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 86-87 (1934). Walter Wheeler Cook's comparison of an over-rigid presumption

And contrary to the Fourth Circuit's view, the fact that terms here are found in the form of a shared statutory *definition* does not deactivate that "controlling" principle. Thus, in *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343 (1997), this Court unanimously held that the term "employee" in Title VII, a term governed by a *single* definition covering that *entire* statute, 42 U.S.C. 2000e(f), includes former employees in some parts of the statute but not in others, depending upon the "context" of the particular use. 519 U.S. at 343-44. See *id.* at 343 (noting that term "may have a plain meaning in the context of a particular section," but not have "the same meaning in all other sections and in all other contexts"). See also *Chevron*, 467 U.S. at 842, 845 (court of appeals erred by imposing "static judicial definition" of term "source" as used in NNSR, stripping EPA of ability to interpret term in a way that made sense "in the context of this particular program"). The Court in *Robinson* concluded that construing "employee" to include former employees was warranted in the context of Title VII's retaliation provisions, a construction "consisten[t] with a primary purpose" of those provisions to maintain access to statutory remedies. 519 U.S. at 346. Compare Pet. App. 18a (Fourth Circuit's conclusion that common definition of "modification" created "mandate" that "the different purposes of the NSPS and PSD programs cannot override").

In contrast to *Rowan*, there is every indication that Congress did *not* mean to require EPA to adopt identical regulatory definitions of "modification," and component terms like emissions "increase," for the distinct, technical, and complex NSPS, PSD, and NNSR programs.[34] EPA must,

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of uniform usage to "'original sin'" has "become a staple of [this Court's] opinions." *General Dynamics Land Sys.*, 540 U.S. at 596 n.8 (citations omitted). See also *Nat'l Mining Ass'n*, 59 F.3d at 1358 (upholding EPA's differing interpretation, in Section 307(d) CAA rulemaking, of "very similar" definitions of major source, and noting that "[d]ifferent [CAA] programs have different objectives and structure").

[34] Nor, as the D.C. Circuit explained, is there is any evidence Congress intended to import any specific NSPS regulation as a statutory

under each program, give effect to the two-step concept of "modification" set forth in 42 U.S.C. 7411(a)(4) – requiring a "physical [or operational] change" that "increases the amount of any air pollutant emitted." (And there is surely no inconsistency between the PSD regulations and that statutory language). By fitting the general definition to the particulars of the respective programs, EPA has properly interpreted the constituents of the definition, including "increase" and "amount emitted" – themselves undefined by Congress – to effectuate differences in coverage, operation, and purpose between NSPS, enacted in 1970, and the two NSR programs enacted seven years later. NSPS and NSR differ fundamentally, and EPA was surely not precluded from taking account of their differences in crafting its respective modification regulations.

NSPS sets identical operational requirements for new and modified sources within a source category, without regard to site-specific factors, and with no threshold based on source size or emissions levels. Congress adopted an entirely different approach in the 1977 amendments.[35] PSD is pervasively concerned with protecting local air quality, a purpose that necessitates, as *Alabama Power* explains, a focus on actual pollution "amounts" – as well as netting to allow sources to make physical changes without PSD review when their overall effect will be to leave air quality in the vicinity unharmed. See *Northern Plains Resource Council v. EPA*, 645 F.2d 1349, 1356 (9th Cir. 1981) (contrasting "equipment oriented" NSPS with "site oriented" PSD program). Instead of generic, national technology-based standards, the PSD provisions require modeling of local pollutant levels, specific

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requirement for PSD. See *New York*, 413 F.3d at 18-20; cf. 42 U.S.C. 7478(b) (*expressly* providing for certain projects commenced before 1977 amendments' effective date to be governed by 1974 PSD regulations).

[35] Recognizing the relevant similarities between the two NSR programs, EPA has chosen to adopt NNSR modification regulations "largely identical" to its PSD regulations. See 57 Fed. Reg. at 32316 n.7.

determinations of the probable impacts of the proposed project's emissions on local air quality, and pollution controls imposed in a "case-by-case" manner.

The word "source" in the common modification definition has a different referent under PSD than under NSPS. Compare 42 U.S.C. 7411(a)(3) (NSPS "stationary source") with *id.* 7479(1) (PSD "major emitting facility"). That difference reflects the disparate mechanics and purposes of the respective programs. Unlike the NSPS definition, the PSD definition (like other PSD provisions) measures emissions in "tons per year," *id.*, draws the distinction between what a source "emits" and its emissions "capacity," see *New York*, 413 F.3d at 39-40; *Alabama Power*, 636 F.2d at 353, and evinces Congress's intent that PSD, unlike NSPS, be restricted to facilities "which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emission of the deleterious pollutants that befoul our nation's air." *Id.*; see *id.* at 400 n.46; compare 53 Fed. Reg. 5860 (Feb. 26, 1988) (adopting NSPS for residential wood stoves). It is both feasible and important to measure increases in actual emissions from the large sources that count as "major emitting facilities," and PSD's dominant emphasis on the specific, local air quality impacts of these large sources fully justified EPA's decision to predicate PSD applicability and increment consumption on actual, annual emissions. See 45 Fed. Reg. at 52701. Whereas in *Rowan* the agency could offer no *reason* for its different regulations on "wages," here EPA extensively explained the basis for its PSD regulations. That the Fourth Circuit disregarded EPA's rationale, along with the text of the regulations, illustrates just how far it strayed from any proper approach to judicial review. See 42 U.S.C. 7607(d)(7), (9).

Congress's use of the same broadly worded, and general, definition of modification under multiple CAA programs cannot be understood as a mandate that EPA construe these terms without regard to the "different contexts" in which

these undefined terms must function throughout this "technical and complex" statute. *Chevron*, 467 U.S. at 863-64; see *id.* at 845.[36]

In another stark contrast to *Rowan*, 452 U.S. at 254, 263 (citing *Central Illinois*), EPA's PSD regulations were crafted to *conform* to precedent from the court empowered by Congress to review national CAA regulations. *Alabama Power*, 636 F.2d at 353, 399-402 & n. 46; see also *New York*, 413 F.3d at 39-40. And the D.C. Circuit has instructed EPA to do what principles of administrative law would ordinarily require – define a PSD "modification" in a manner faithful to the text of the statutory definition *and* to the textual requirements and programmatic ends of the other PSD provisions with which it must function. The Fourth Circuit's ruling, remarkably, *forbids* EPA from doing so, imposing instead a mandate of obliviousness to context. The Congresses that enacted these elaborate programs surely did not intend that result.[37]

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[36] Congress's refusal to alter the PSD modification provisions in 1990, after EPA had operated for a decade under diverging regulatory definitions for NSPS and NSR, and after *WEPCo*, see *supra*, n. 8, further undermines the Fourth Circuit's conclusion. See *Chevron*, 467 U.S. at 863-864; cf. *Nat'l Mining Ass'n*, 59 F.3d at 1363 (Congress's choices "in 1990" should be construed "against a backdrop of over a decade of skirmishing between the agency and affected companies" when these issues were "very much in the forefront").

[37] The court of appeals' rationale would apply to the NNSR program, which like PSD incorporates the Section 111(a)(4) definition, see 42 U.S.C. 7501(4). It would condemn every iteration of EPA's modification regulations under that major CAA program, see, *e.g.*, 40 C.F.R. 51.165(a)(vi)(A), (a)(vii) (2005), applicable in areas failing to mean the health-based NAAQS. See 42 U.S.C. 7502(c)(5). And it would do so despite unambiguous statutory text measuring NNSR emissions in actual, annual terms. See *supra*, pp. 15-16, 40. See also 42 U.S.C. 7429(g)(3) (modification definition for solid waste incinerators, added in 1990, phrased very similarly to Section 111(a)(4) definition).

C. The Emissions Increase Test Imposed by the Fourth Circuit Violates the Statute.

The effect of the court of appeals' "identical regulations" mandate was to require that EPA use a maximum hourly rate test for PSD – at least until such time as EPA amends its *NSPS* regulations. See Pet. App. 18a.[38] But that test would violate the plain text and fundamental objectives of the Act's PSD provisions and contravene the D.C. Circuit's unappealed decisions in *Alabama Power* and *New York*.

The "plain language of the CAA" requires that EPA "apply NSR to changes that increase actual emissions instead of potential or allowable emissions." *New York*, 413 F.3d at 40. See also *Alabama Power*, 636 F.2d at 353, 400-01. A maximum hourly rate test violates that command. The "amount" of pollutant "emitted" by a source is not merely a function of its maximum hourly rates, but also of how much the plant is in use. See JA 294. Yet the regulatory test improperly imposed by the courts below simply pretends that increases in actual emissions from expanded use do not exist. See Pet. App. 58a-59a; cf. 61 Fed. Reg. at 38269 (effect of Exhibit B proposal "to eliminate a source's level of operations as a factor when determining whether a proposed change will result in an increase" and to "completely disregard[]" utilization). Such an approach is at odds with an entire PSD enactment concerned with changes in actual local air quality, not in engineering potentials or regulatory allowances. See 45 Fed. Reg. at 52700 (potential emissions

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[38] The Fourth Circuit never explained why, even *assuming* the common statutory definitions mandated regulatory identity between NSPS and the PSD, it was the *PSD* regulations that should be condemned, even though those regulations hew to the plain language of the modification definition, fit with PSD-specific provisions of the Act, and were crafted to conform to a decision of the court empowered by Congress to review CAA regulations. See also *New York*, 413 F.3d at 19 (stating that NSPS hourly rate regulation was "possibly inconsistent" with another NSPS regulation that *tracked the statutory definition* of modification) (comparing 40 C.F.R. 60.2(h) (1976) with 40 C.F.R. 60.14(a) (1976)).

test "could permit actual air quality to deteriorate seriously"); 61 Fed. Reg. at 38268-70 (detailing adverse "environmental consequences" of Exhibit B proposal); 67 Fed. Reg. at 80205 (Exhibit B approach "detrimental to air quality").

Nor does such an approach to PSD "modifications" fare well as a matter of "ordinary or natural meaning." *S.D. Warren Co. v. Maine Bd. of Envt'l Protection*, 126 S. Ct. 1843, 1847 (2006) (citation omitted). A major overhaul that enables an old plant to operate, say, ten times as many hours as it could in its prior condition – with a correspondingly large increase in quantities of pollution actually released into the local airshed that is PSD's concern – is, manifestly, a "physical change" that "increases the amount of any air pollutant emitted" by the source. "Were it not for the hundreds of pages of briefing" submitted in the D.C. Circuit and elsewhere trying to impose on PSD accounting methodologies calculated to disregard actual emissions, "one would have thought it fairly clear that this text does not permit" such an approach. *American Trucking*, 531 U.S. at 465. See *New York II*, 443 F.3d at 889.

Ignoring increases in emissions from the expanded operations of "modernized" sources is inconsistent with the limits Congress placed on the grandfathering benefit conferred on existing sources in 1977. As the D.C. Circuit observed in *Alabama Power*, by extending the Act's PSD requirements to "modifications," Congress denied these sources a "perpetual immunity from all standards under the PSD program." 636 F.2d at 400.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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ADDENDUM

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Clean Air Act, ch 360, 69 Stat. 322 (1955), as amended by the Clean Air Act Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676, and by the Clean Air Act Amendments of 1977, Pub. L. 95-95, 91 Stat. 685, and by the Clean Air Act Amendments of 1990, Pub. L. 101-549, 104 Stat. 2399 (codified at 42 U.S.C. §§ 7401 *et seq.*):

42 U.S.C. 7411 (excerpted) 2a
42 U.S.C. 7412 (excerpted) 5a
42 U.S.C. 7471 . . . . . .5a
42 U.S.C. 7472 . . . . . 5a
42 U.S.C. 7473 (excerpted) 6a
42 U.S.C. 7475 (excerpted) 7a
42 U.S.C. 7479 . . . . . .11a
42 U.S.C. 7501 (excerpted) 14a
42 U.S.C. 7502 (excerpted) 14a
42 U.S.C. 7607 (excerpted) 15a

Code of Federal Regulations:

40 C.F.R. 51.166 (1987) (excerpted) 22a
40 C.F.R. 51.166(b)(21) (1993) (excerpted) 33a
40 C.F.R. 60.2, 60.14 (1976)(excerpted) 35a
40 C.F.R. 60.14 (1987) (excerpted) 40a

42 U.S.C. § 7411 [Section 111]

Standards of performance for new stationary sources

(a) Definitions. For purposes of this section:

(1) The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant. Nothing in subchapter II of this chapter relating to nonroad engines shall be construed to apply to stationary internal combustion engines.

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term "existing source" means any stationary source other than a new source.

* * * * *

(b) List of categories of stationary sources; standards of performance; information on pollution control techniques; sources owned or operated by United States; particular systems; revised standards.

(1) (A) The Administrator shall, within 90 days after December 31, 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment in causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.

* * * * *

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

* * * * *

(d) Standards of performance for existing sources; remaining useful life of source.

(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall

submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

(2) The Administrator shall have the same authority—

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 7410(c) of this title in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 7413 and 7414 of this title with respect to an implementation plan.

In promulgating a standard of performance under a plan prescribed under this paragraph, the Administrator shall take into consideration, among other factors, remaining useful lives of the sources in the category of sources to which such standard applies.

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42 U.S.C. § 7412 [Section 112]

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(a)(5) The term "modification" means any physical change in, or change in the method of operation of, a major source which increases the actual emissions of any hazardous air pollutant emitted by such source by more than a de minimis amount or which results in the emission of any hazardous air pollutant not previously emitted by more than a de minimis amount.

* * * * *

42 U.S.C. § 7471 [Section 161]

Plan requirements

In accordance with the policy of section 7401(b)(1) of this title, each applicable implementation plan shall contain emission limitations and such other measures as may be necessary, as determined under regulations promulgated under this part, to prevent significant deterioration of air quality in each region (or portion thereof) designated pursuant to section 7407 of this title as attainment or unclassifiable.

42 U.S.C. § 7472 [Section 162]

Initial classifications

(a) Areas designated as class I

Upon the enactment of this part, all—

(1) international parks,

(2) national wilderness areas which exceed 5,000

acres in size,

(3) national memorial parks which exceed 5,000 acres in size, and

(4) national parks which exceed six thousand acres in size,

and which are in existence on August 7, 1977, shall be class I areas and may not be redesignated. All areas which were redesignated as class I under regulations promulgated before August 7, 1977, shall be class I areas which may be redesignated as provided in this part. The extent of the areas designated as Class I under this section shall conform to any changes in the boundaries of such areas which have occurred subsequent to August 7, 1977, or which may occur subsequent to November 15, 1990.

(b) Areas designated as class II

All areas in such State designated pursuant to section 7407(d) of this title as attainment or unclassifiable which are not established as class I under subsection (a) of this section shall be class II areas unless redesignated under section 7474 of this title.

42 U.S.C. § 7473 [Section 163]

Increments and ceilings

(a) Sulfur dioxide and particulate matter; requirement that maximum allowable increases and maximum allowable concentrations not be exceeded.

In the case of sulfur oxide and particulate matter, each applicable implementation plan shall contain measures assuring that maximum allowable increases over baseline

concentrations of, and maximum allowable concentrations of, such pollutant shall not be exceeded. In the case of any maximum allowable increase (except an allowable increase specified under section 7475(d)(2)(C)(iv) of this title) for a pollutant based on concentrations permitted under national ambient air quality standards for any period other than an annual period, such regulations shall permit such maximum allowable increase to be exceeded during one such period per year.

* * * * *

42 U.S.C. § 7475 [Section 165]

Preconstruction requirements

(a) Major emitting facilities on which construction is commenced. No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless—

(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;

(2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

(3) the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this Act;

(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this Act emitted from, or which results from, such facility;

(5) the provisions of subsection (d) of this section with respect to protection of class I areas have been complied with for such facility;

(6) there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;

(7) the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source; and

(8) in the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under section 7411 of this title has been

promulgated subsequent to August 7, 1977, for such source category, the Administrator has approved the determination of best available technology as set forth in the permit.

(b) Exception. The demonstration pertaining to maximum allowable increases required under subsection (a)(3) of this section shall not apply to maximum allowable increases for class II areas in the case of an expansion or modification of a major emitting facility which is in existence on August 7, 1977 whose allowable emissions of air pollutants, after compliance with subsection (a)(4) of this section, will be less than fifty tons per year and for which the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur oxides will not cause or contribute to ambient air quality levels in excess of the national secondary ambient air quality standard for either of such pollutants.

* * * * *

(e) Analysis; continuous air quality monitoring data; regulations; model adjustments.

(1) The review provided for in subsection (a) of this section shall be preceded by an analysis in accordance with regulations of the Administrator, promulgated under this subsection, which may be conducted by the State (or any general purpose unit of local government) or by the major emitting facility applying for such permit, of the ambient air quality at the proposed site and in areas which may be affected by emissions from such facility for each pollutant subject to regulation under this chapter which will be emitted from such facility.

(2) Effective one year after August 7, 1977, the analysis required by this subsection shall include continuous air quality monitoring data gathered for purposes of

determining whether emissions from such facility will exceed the maximum allowable increases or the maximum allowable concentration permitted under this part. Such data shall be gathered over a period of one calendar year preceding the date of application for a permit under this part unless the State, in accordance with regulations promulgated by the Administrator, determines that a complete and adequate analysis for such purposes may be accomplished in a shorter period. The results of such analysis shall be available at the time of the public hearing on the application for such permit.

(3) The Administrator shall within six months after August 7, 1977 promulgate regulations respecting the analysis required under this subsection which regulations—

(A) shall not require the use of any automatic or uniform buffer zone or zones,

(B) shall require an analysis of the ambient air quality, climate and meteorology, terrain, soils and vegetation, and visibility at the site of the proposed major emitting facility and in the area potentially affected by the emissions from such facility for each pollutant regulated under this chapter which will be emitted from, or which results from the construction or operation of, such facility, the size and nature of the proposed facility, the degree of continuous emission reduction which could be achieved by such facility, and such other factors as may be relevant in determining the effect of emissions from a proposed facility on any air quality control region,

(C) shall require the results of such analysis shall be available at the time of the public hearing on the application for such permit, and

(D) shall specify with reasonable particularity each air quality model or models to be used under specified sets of conditions for purposes of this part.

Any model or models designated under such regulations may be adjusted upon a determination, after notice and opportunity for public hearing, by the Administrator that such adjustment is necessary to take into account unique terrain or meteorological characteristics of an area potentially affected by emissions from a source applying for a permit required under this part.

42 U.S.C. § 7479 [Section 169]

Definitions

For purposes of this part—

(1) The term "major emitting facility" means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input, petroleum

storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities. Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

(2) (A) The term "commenced" as applied to construction of a major emitting facility means that the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations and either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.

(B) The term "necessary preconstruction approvals or permits" means those permits or approvals, required by the permitting authority as a precondition to undertaking any activity under clauses (i) or (ii) of subparagraph (A) of this paragraph.

(C) The term "construction" when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility.

(3) The term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this Act emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case

basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of "best available control technology" result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to November 15, 1990.

(4) The term "baseline concentration" means, with respect to a pollutant, the ambient concentration levels which exist at the time of the first application for a permit in an area subject to this part, based on air quality data available in the Environmental Protection Agency or a State air pollution control agency and on such monitoring data as the permit applicant is required to submit. Such ambient concentration levels shall take into account all projected emissions in, or which may affect, such area from any major emitting facility on which construction commenced prior to January 6, 1975, but which has not begun operation by the date of the baseline air quality concentration determination. Emissions of sulfur oxides and particulate matter from any major emitting facility on which construction commenced after January 6, 1975, shall not be included in the baseline and shall be counted against the maximum allowable increases in pollutant concentrations established under this part.

42 U.S.C. § 7501 [Section 171]

Definitions

For the purposes of this part—

* * * * *

(2) Nonattainment area. The term "nonattainment area" means, for any air pollutant, an area which is designated "nonattainment" with respect to that pollutant within the meaning of section 7407(d) of this title.

* * * * *

(4) The terms "modifications" and "modified" mean the same as the term "modification" as used in section 7411(a)(4) of this title.

42 U.S.C. § 7502 [Section 172]

Nonattainment plan provisions in general

* * * * *

(c) Nonattainment plan provisions. The plan provisions (including plan items) required to be submitted under this part shall comply with each of the following:

> (1) In general. Such plan provisions shall provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology) and shall provide for attainment of the national primary ambient air

quality standards.

* * * * *

(3) Inventory. Such plan provisions shall include a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in such area, including such periodic revisions as the Administrator may determine necessary to assure that the requirements of this part are met.

* * * * *

42 U.S.C. § 7607 [Section 307]

Administrative proceedings and judicial review

* * * * *

(b) Judicial review.

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's

action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this titlet, or any other final action of the Administrator under this Act (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

(c) Additional evidence. In any judicial proceeding in which review is sought of a determination under this Act required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(d) Rulemaking.

* * * * *

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical)

docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

* * * * *

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6) (A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7) (A) The record for judicial review shall consist

exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b)). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b)) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only *if* the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after August 7, 1977.

(e) Other methods of judicial review not authorized. Nothing in this Act shall be construed to authorize judicial review of regulations or orders of the Administrator under this Act, except as provided in this section.

40 C.F.R. § 51.166 (1987)

TITLE 40 – Protection of Environment
CHAPTER I – Environmental Protection Agency
SUBCHAPTER C –Air Programs

Part 51—Requirements for Preparation, Adoption, and Submittal of Implementation Plans
Subpart I—Review of New Sources and Modifications

§ 51.166 Prevention of significant deterioration of air quality.

(a) (1) *Plan requirements.* In accordance with the policy of section 101(b)(1) of the act and the purposes of section 160 of the Act, each applicable State implementation plan shall contain emission limitations and such other measures as may be necessary to prevent significant deterioration of air quality.

(2) Plan Revisions. If a State Implementation Plan revision would result in increased air quality deterioration over any baseline concentration, the plan revision shall include a demonstration that it will not cause or contribute to a violation of the applicable increment(s). If a plan revision proposing less restrictive requirements was submitted after August 7, 1977 but on or before any applicable baseline date and was pending action by the Administrator on that date, no such demonstration is necessary with respect to the area for which a baseline date would be established before final action is taken on the plan revision. Instead, the assessment described in paragraph (a)(4) of this section, shall review the expected impact to the applicable increment(s).

(3) Required plan revision. If the State or the

Administrator determines that a plan is substantially inadequate to prevent significant deterioration or that an applicable increment is being violated, the plan shall be revised to correct the inadequacy or the violation. The plan shall be revised within 60 days of such a finding by a State or within 60 days following notification by the Administrator, or by such later date as prescribed by the Administrator after consultation with the State.

(4) Plan assessment. The State shall review the adequacy of a plan on a periodic basis and within 60 days of such time as information becomes available that an applicable increment is being violated.

(5) Public participation. Any State action taken under this paragraph shall be subject to the opportunity for public hearing in accordance with procedures equivalent to those established in § 51.102.

* * * * *

(b) *Definitions.* All state plans shall use the following definitions for the purposes of this section. Deviations from the following wording will be approved only if the state specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definitions below:

(1)(i) "Major stationary source" means:

(a) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Act: Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills,

portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants, fossil fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(b) Notwithstanding the stationary source size specified in paragraph (b)(1)(i)*(a)* of this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of any air pollutant subject to regulation under the Act; or

(c) Any physical change that would occur at a stationary source not otherwise qualifying under paragraph (b)(1) of this section, as a major stationary source if the change would constitute a major stationary source by itself.

* * * * *

(2)(i) "Major modification" means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.

(ii) Any net emissions increase that is significant for volatile organic compounds shall be considered significant for ozone.

(iii) A physical change or change in the method of operation shall not include:

(*a*) Routine maintenance, repair, and replacement;

* * * * *

(*f*) An increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Subpart I or § 51.166.

(*g*) Any change in ownership at a stationary source.

(3)(i) "Net emissions increase" means the amount by which the sum of the following exceeds zero:

(*a*) Any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and

(*b*) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

(ii) An increase or decrease in actual emissions is

contemporaneous with the increase from the particular change only if it occurs within a reasonable period (to be specified by the state) before the date that the increase from the particular change occurs.

(iii) An increase or decrease in actual emissions is creditable only if the reviewing authority has not relied on it in issuing a permit for the source under regulations approved pursuant to this section, which permit is in effect when the increase in actual emissions from the particular change occurs.

(iv) An increase or decrease in actual emissions of sulfur dioxide or particulate matter which occurs before the applicable baseline date is creditable only if it is required to be considered in calculating the amount of maximum allowable increases remaining available.

(v) An increase in actual emissions is creditable only to the extent that the new level of actual emissions exceeds the old level.

(vi) A decrease in actual emissions is creditable only to the extent that:

(*a*) The old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of actual emissions;

(*b*) It is federally enforceable at and after the time that actual construction on the particular change begins; and

(*c*) It has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change.

* * * * *

(8) "Construction" means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in actual emissions.

* * * * *

(13)(i) "Baseline concentration" means that ambient concentration level which exists in the baseline area at the time of the applicable baseline date. A baseline concentration is determined for each pollutant for which a baseline date is established and shall include:

(*a*) The actual emissions representative of sources in existence on the applicable baseline date, except as provided in paragraph (b)(13)(ii) of this section;

* * * * *

(21) (i) "Actual emissions" means the actual rate of emissions of a pollutant from an emissions unit, as determined in accordance with paragraphs (b)(21)(ii) through (iv) of this section.

(ii) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. The reviewing authority may allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(iii) The reviewing authority may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(iv) For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

* * * * *

(23)(i) "Significant" means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate

Carbon monoxide: 100 tons per year (tpy)
Nitrogen oxides: 40 tpy
Sulfur dioxide: 40 tpy
Particulate matter: 25 tpy of particulate matter emissions.
15 tpy of PM_{10} emissions.
Ozone: 40 tpy of volatile organic compounds
Lead. 0.6 tpy
Asbestos: 0.007 tpy
Beryllium: 0.0004 tpy
Mercury: 0.1 tpy
Vinyl chloride: 1 tpy
Fluorides: 3 tpy
Sulfuric acid mist: 7 tpy
Hydrogen sulfide (H_2S): 10 tpy
Total reduced sulfur (including H_2S): 10 tpy
Reduced sulfur compounds (including H_2S): 10 tpy

* * * * *

(c) *Ambient air increments.* The plan shall contain emission limitations and such other measures as may be necessary to assure that in areas designated as Class I, II, or III, increases in pollutant concentration over the base-line concentration shall be limited to the following:

Maximum allowable increase (micrograms per cubic Pollutant meter)

CLASS I

Particulate matter:	
TSP, annual geometric mean	5
TSP, 24-hr maximum	10
Sulfur dioxide:	
Annual arithmetic mean	2
24-hr maximum	5
3-hr maximum	25

CLASS II

Particulate matter:	
TSP, annual geometric mean	19
TSP, 24-hr maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
24-hr maximum	91
3-hr maximum	512

CLASS III

Particulate matter:	
TSP, annual geometric mean	37
TSP, 24-hr maximum	75
Sulfur dioxide:	
Annual arithmetic mean	40
24-hr maximum	182
3-hr maximum	700

For any period other than an annual period, the applicable

maximum allowable increase may be exceeded during one such period per year at any one location.

(d) *Ambient air ceilings.* The plan shall provide that no concentration of a pollutant shall exceed:

(1) The concentration permitted under the national secondary ambient air quality standard, or

(2) The concentration permitted under the national primary ambient air quality standard, whichever concentration is lowest for the pollutant for a period of exposure.

* * * * *

(i) *Review of major stationary sources and major modifications – source applicability and exemptions.*

* * * * *

(7) The plan may provide that requirements equivalent to those contained in paragraphs (k), (m), and (o) of this section as they relate to any maximum allowable increase for a Class II area do not apply to a modification of a major stationary source that was in existence on March 1, 1978, if the net increase in allowable emissions of each pollutant subject to regulation under the Act from the modification after the application of best available control technology would be less than 50 tons per year.

* * * * *

(k) *Source impact analysis.* The plan shall provide that the owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other

applicable emissions increases or reduction (including secondary emissions) would not cause or contribute to air pollution in violation of:

(1) Any national ambient air quality standard in any air quality control region; or

(2) Any applicable maximum allowable increase over the baseline concentration in any area.

* * * * *

(m) *Air quality analysis* – (1) Preapplication analysis. (i) The plan shall provide that any application for a permit under regulations approved pursuant to this section shall contain an analysis of ambient air quality in the area that the major stationary source or major modification would affect for each of the following pollutants:

(*a*) For the source, each pollutant that it would have the potential to emit in a significant amount;

(*b*) For the modification, each pollutant for which it would result in a significant net emissions increase.

* * * * *

(2) Post-construction monitoring. The plan shall provide that the owner or operator of a major stationary source or major modification shall, after construction of the stationary source or modification, conduct such ambient monitoring as the reviewing authority determines is necessary to determine the effect emissions from the stationary source or modification may have, or are having, on air quality in any area.

40 C.F.R. § 51.166(b)(21), (32) (1993) (as added by 57 Fed. Reg. 32314, 32335 (July 21, 1992))

(b)(21):

* * * * *

(iv) For any emissions unit (other than an electric utility steam generating unit specified in paragraph (b)(21)(v) of this section) which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(v) For an electric utility steam generating unit (other than a new unit or the replacement of an existing unit) actual emissions of the unit following the physical or operational change shall equal the representative actual annual emissions of the unit following the physical or operational change, provided the source owner or operator maintains and submits to the reviewing authority, on an annual basis for a period of 5 years from the date the unit resumes regular operation, information demonstrating that the physical or operational change did not result in an emissions increase. A longer period, not to exceed 10 years, may be required by the reviewing authority if it determines such a period to be more representative of normal source post-change operations.

* * * * *

(b)(32) Representative actual annual emissions means the average rate, in tons per year, at which the source is projected to emit a pollutant for the two-year period after a physical change or change in the method of operation of a unit, (or a

different consecutive two-year period within 10 years after that change, where the reviewing authority determines that such period is more representative of normal source operations), considering the effect any such change will have on increasing or decreasing the hourly emissions rate and on projected capacity utilization. In projecting future emissions the reviewing authority shall:

(i) Consider all relevant information, including but not limited to, historical operational data, the company's own representations, filings with the State or Federal regulatory authorities, and compliance plans under title IV of the Clean Air Act; and

(ii) Exclude, in calculating any increase in emissions that results from the particular physical change or change in the method of operation at an electric utility steam generating unit, that portion of the unit's emissions following the change that could have been accommodated during the representative baseline period and is attributable to an increase in projected capacity utilization at the unit that is unrelated to the particular change, including any increased utilization due to the rate of electricity demand growth for the utility system as a whole.

* * * * *

60 C.F.R. 60.2, 60.14 (1976)

Title 40—Protection of Environment
Chapter I—Environmental Protection Agency
Subchapter C—Air Programs

[FRL 402-8]

PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

Modification, Notification, and Reconstruction

* * * * *

§ 60.2 Definitions.

* * * * *

(h) "Modification" means any physical change in, or change in the method of operation of, an existing facility which increases the amount of any air pollutant (to which a standard applies) emitted into the atmosphere by that facility or which results in the emission of any air pollutant (to which a standard applies) into the atmosphere not previously emitted.

* * * * *

§ 60.14 Modification.

(a) Except as provided under paragraphs (d), (e) and (f) of this section, any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies shall be considered a modification with the meaning of section 111 of the Act. Upon modification, an existing facility shall become an affected facility for each pollutant to which a standard applies and for which there is an increase in the

emission rate to the atmosphere.

(b) Emission rate shall be expressed as kg/hr of any pollutant discharged into the atmosphere for which a standard is applicable. The Administrator shall use the following to determine emission rate:

(1) Emission factors as specified in the latest issue of "Compilation of Air Pollutant Emission Factors," EPA Publication No. AP-42, or other emission factors determined by the Administrator to be superior to AP-42 emission factors, in cases where utilization of, emission factors demonstrate that the emission level resulting from the physical or operational change will either clearly increase or clearly not increase.

(2) Material balances, continuous monitor data, or manual emission tests in cases where utilization of emission factors as referenced in paragraph (b)(1) of this section does not demonstrate to the Administrator's satisfaction whether the emission level resulting from the physical or operational change will either clearly increase or clearly not increase, or where an owner or operator demonstrates to the Administrator's satisfaction that there are reasonable grounds to dispute the result obtained by the Administrator utilizing emission factors as referenced in paragraph (b)(1) of this section. When the emission rate is based on results from manual emission tests or continuous monitoring systems, the procedures specified in Appendix C of this part shall be used to determine whether an increase in emission rate has occurred. Tests shall be conducted under such conditions as the Administrator shall specify to the owner or operator based on representative performance of the facility. At least three valid test runs must be conducted before and at least three after the physical or operational change. All operating

parameters which may affect emissions must be held constant to the maximum feasible degree for all test runs.

(c) The addition of an affected facility to a stationary source as an expansion to that source or as a replacement for an existing facility shall not by itself bring within the applicability of this part any other facility within that source.

(d) A modification shall not be deemed to occur if an existing facility undergoes a physical or operational change where the owner or operator demonstrates to the Administrator's satisfaction (by any of the procedures prescribed under paragraph (b) of this section) that the total emission rate of any pollutant has not increased from all facilities within the stationary source to which appropriate reference, equivalent, or alternative methods, as defined in § 60.2(s), (t) and (u), can be applied. An owner or operator may completely and permanently close any facility within a stationary source to prevent an increase in the total emission rate regardless of whether such reference, equivalent, or alternative method can be applied, if the decrease in emission rate from such closure can be adequately determined by any of the procedures prescribed under paragraph (b) of this section. The owner or operator of the source shall have the burden of demonstrating compliance with this section.

(1) Such demonstration shall be in writing and shall include: (i) The name and address of the owner or operator.

(ii) The location of the stationary source.

(iii) A complete description of the existing facility undergoing the physical or operational change resulting in an increase in emission rate, any applicable control system, and the physical or

operational change to such facility.

(iv) The emission rates into the atmosphere from the existing facility of each pollutant to which a standard applies determined before and after the physical or operational change takes place, to the extent such information is known or can be predicted.

(v) A complete description of each facility and the control systems, if any, for those facilities within the stationary source where the emission rate of each pollutant in question will be decreased to compensate for the increase in emission rate from the existing facility undergoing the physical or operational change.

(vi) The emission rates into the atmosphere of the pollutants in question from each facility described under paragraph (d)(1)(v) of this section both before and after the improvement or installation of any applicable control system or any physical or operational changes to such facilities to reduce emission rate.

(vii) A complete description of the procedures and methods used to determine the emission rates.

(2) Compliance with paragraph (d) of this section may be demonstrated by the methods listed in paragraph (b) of this section, where appropriate. Decreases in emissions resulting from requirements of a State implementation plan approved or promulgated under Part 52 of this chapter will not be acceptable. The required reduction in emission rate may be accomplished through the installation or improvement of a control system or through physical or operational

changes to facilities including reducing the production of a facility or closing a facility.

(3) Emission rates established for the existing facility which is undergoing a physical or operational change resulting in an increase in the emission rate, and established for the facilities described under paragraph (d)(1)(v) of this section shall become the baseline for determining whether such facilities undergo a modification or are in compliance with standards.

(4) Any emission rate in excess of that rate established under paragraph (d)(3) of this section shall be in violation of these regulations except as otherwise provided in paragraph (e) of this section. However, any owner or operator electing to demonstrate compliance under this paragraph (d) must apply to the Administrator to obtain the use of any exemptions under paragraphs (e)(2), (e)(3), and (e)(4) of this section. The Administrator will grant such exemption only if, in his judgment, the compliance originally demonstrated under this paragraph will not be circumvented or nullified by the utilization of the exemption.

(5) The Administrator may require the use of continuous monitoring devices and compliance with necessary reporting procedures for each facility described in paragraph (d)(1)(iii) and (d)(1)(v) of this section.

(e) The following shall not, by themselves, be considered modifications under this part:

(1) Maintenance, repair, and replacement which the Administrator determines to be routine for a source category, subject to the provisions of paragraph (c) of

this section and § 60.15.

(2) An increase in production rate of an existing facility, if that increase can be accomplished without a capital expenditure on the stationary source containing the facility.

(3) An increase in the hours of operation.

* * * * *

40 C.F.R. § 60.14 (1987)

TITLE 40 – Protection of Environment
CHAPTER I – Environmental Protection Agency
SUBCHAPTER C –Air Programs

Part 60—Standards of Performance for New Stationary Sources

Subpart A—General Provisions

§ 60.14 Modification.

(a) Except as provided under paragraphs (e) and (f) of this section, any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies shall be considered a modification within the meaning of section 111 of the Act. Upon modification, an existing facility shall become an affected facility for each pollutant to which a standard applies and for which there is an increase in the emission rate to the atmosphere.

(b) Emission rate shall be expressed as kg/hr of any pollutant discharged into the atmosphere for which a standard is applicable. The Administrator shall use the following to

determine emission rate:

(1) Emission factors as specified in the latest issue of "Compilation of Air Pollutant Emission Factors," EPA Publication No. AP-42, or other emission factors determined by the Administrator to be superior to AP-42 emission factors, in cases where utilization of emission factors demonstrate that the emission level resulting from the physical or operational change will either clearly increase or clearly not increase.

(2) Material balances, continuous monitor data, or manual emission tests in cases where utilization of emission factors as referenced in paragraph (b) (1) of this section does not demonstrate to the Administrator's satisfaction whether the emission level resulting from the physical or operational change will either clearly increase or clearly not increase, or where an owner or operator demonstrates to the Administrator's satisfaction that there are reasonable grounds to dispute the result obtained by the Administrator utilizing emission factors as referenced in paragraph (b)(1) of this section. When the emission rate is based on results from manual emission tests or continuous monitoring systems, the procedures specified in Appendix C of this part shall be used to determine whether an increase in emission rate has occurred. Tests shall be conducted under such conditions as the Administrator shall specify to the owner or operator based on representative performance of the facility. At least three valid test runs must be conducted before and at least three after the physical or operational change. All operating parameters which may affect emissions must be held constant to the maximum feasible degree for all test runs.

(c) The addition of an affected facility to a stationary source as an expansion to that source or as a replacement for an existing facility shall not by itself bring within the applicability of this part any other facility within that source.

(d) [Reserved]

(e) The following shall not, by themselves, be considered modifications under this part:

(1) Maintenance, repair, and replacement which the Administrator determines to be routine for a source category, subject to the provisions of paragraph (c) of this section and § 60.15.

(2) An increase in production rate of an existing facility, if that increase can be accomplished without a capital expenditure on that facility.

(3) An increase in the hours of operation.

* * * * *

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No. 05-848

In the Supreme Court of the United States

ENVIRONMENTAL DEFENSE, ET AL., PETITIONERS

v.

DUKE ENERGY CORPORATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS RESPONDENT SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

In this civil enforcement action under the Prevention of Significant Deterioration (PSD) provisions of the Clean Air Act, 42 U.S.C. 7401 *et seq.*, the court of appeals held that the Environmental Protection Agency (EPA) regulations construing the statutory term "modification" for purposes of the PSD program must be given the same meaning as EPA's regulations construing that term for purposes of the separate New Source Performance Standards (NSPS) program. The questions presented are:

1. Whether the court of appeals' decision contravenes Section 307 of the Clean Air Act, 42 U.S.C. 7607, which provides that nationally applicable regulations issued by EPA to implement the Clean Air Act may be reviewed only through properly filed petitions for review in the D.C. Circuit, not in an enforcement action.

2. Assuming the answer to the first question is no, the following question is presented: whether the Clean Air Act, which defines "modification" in both the PSD and NSPS programs as a physical or operational change that "increases" emissions of pollutants, requires EPA to measure emission "increases" under the PSD program in the same manner as it measures emission "increases" under the NSPS program.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 411 F.3d 539. The opinion of the district court (Pet. App. 22a-84a) is reported at 278 F. Supp. 2d 619.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 2005. A petition for rehearing was denied on August 30, 2005 (Pet. App. 20a-21a). On November 17, 2005, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 28, 2005, and the petition was filed on that date. The petition for a writ of certiorari was granted on May 15, 2006. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are set forth in an appendix to this brief. App., *infra*, 1a-23a.

STATEMENT

This case is a civil enforcement action brought by the United States against respondent Duke Energy for illegally modifying generating plants without complying with the Prevention of Significant Deterioration (PSD) program of the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*

1. The CAA was enacted "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. 7401(b)(1). It directs the U.S. Environmental Protection Agency (EPA) to promulgate National Ambient Air Quality Standards (NAAQS) specifying allowable concentrations of air pollutants. 42 U.S.C. 7408-7409; *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 462 (2001). Each State must develop a "State implementation plan" (SIP) to achieve and maintain the NAAQS. *E.g.*, 42 U.S.C. 7410; *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 249-250 (1976).

In 1970, Congress added the New Source Performance Standards (NSPS) program, which directs EPA to promulgate technology-based performance standards for new or modified facilities in certain categories of stationary sources. 42 U.S.C. 7411. The NSPS program is intended to ensure that pollution from new and modified emissions sources will be controlled. Thus, its standards are based on application of the best demonstrated system of emission reduction across particular industries and across the country, regardless of the actual effect of a source's emissions on local air quality. *Ibid.*

The NSPS program "was not entirely successful." Pet. App. 3a. In 1977, Congress enacted the Clean Air Act Amend-

ments of 1977, Pub. L. No. 95-95, 91 Stat. 685, which established a statutory PSD program.[1] The PSD program is part of the larger New Source Review (NSR) program, which also includes a nonattainment component for areas not satisfying ambient air standards. 42 U.S.C. 7501-7508. The nonattainment NSR program is not directly at issue in this case.

The PSD program is intended to prevent significant deterioration of air quality in areas other than the nonattainment areas (*viz.* where ambient air quality standards are already being met and in unclassified areas), while also fostering economic growth in a manner consistent with the preservation of existing clean air resources. 42 U.S.C. 7470(1) and (3); *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 470-471 (2004); *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 346-351 (D.C. Cir. 1979). The PSD program directly addresses the impact on ambient air quality resulting from new construction of, and modifications to, pollutant-emitting facilities in such areas. 42 U.S.C. 7470, 7475(a)(3).

The core provision of PSD provides that "[n]o major emitting facility * * * may be *constructed* in any area to which [the PSD provisions] appl[y] unless" various requirements are met. 42 U.S.C. 7475(a) (emphasis added). Those requirements include obtaining a permit setting forth emission limitations and applying "best available control technology" (BACT). See 42 U.S.C. 7475(a)(1) and (4); 42 U.S.C. 7479(3).

The PSD provisions apply to "construct[ion]" of facilities, and they further provide that "[t]he term 'construction' * * *

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[1] In 1974, EPA had established a regulatory PSD program as a result of a lawsuit, *Sierra Club* v. *Ruckelshaus*, 344 F. Supp. 253 (D.D.C.1972), aff'd without opinion, 4 Env't Rep. Cas. (BNA) 1815, No. CIV. A. 1031-72 (D.C. Cir. Nov. 1, 1972), aff'd by an equally divided court, 412 U.S. 541 (1973). See 39 Fed. Reg. 42,510 (1974). The 1977 Amendments "drew upon, expanded, and superseded" that earlier regulatory program. *New York* v. *U.S. EPA*, 413 F.3d 3, 12 (D.C. Cir. 2005).

includes the *modification* (as defined in Section 7411(a) of this title) of any source or facility." 42 U.S.C. 7479(2)(C) (emphasis added). Section 7411(a) (which is one of the statutory provisions applicable to the NSPS program) defines the crucial term "modification" as:

> any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

42 U.S.C. 7411(a)(4).

Thus, determining whether a planned activity is a "modification"—and is therefore "construction" subject to the PSD permitting requirements—involves a two-step process: (1) determining whether a project is a physical or operational change; and (2) if so, determining whether the change increases emissions or results in the emission of new pollutants.

2. EPA promulgated regulations to implement the statutory PSD program in 1978. 43 Fed. Reg. 26,380 (1978). It revised those regulations in 1980, 1992, and 2002. The Duke projects that are the subject of this enforcement action were undertaken between 1988 and 2000. Thus, the applicable regulations are (a) the 1980 regulations, 45 Fed. Reg. 52,676, which were recodified in 1987, 40 C.F.R. 51.166; and (b) the 1992 regulations, 57 Fed. Reg. 32,314; 40 C.F.R. 51.166 (1993).[2] Both versions determine whether a change has in-

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[2] EPA's 1980 PSD regulations setting forth the minimum requirements for EPA-approved state PSD programs were originally promulgated at 40 C.F.R. 51.24 (1981) and were later redesignated at 40 C.F.R. 51.166 (1987). Unless otherwise indicated, this brief cites to the 1987 recodification, as did the court of appeals. Both the North and South Carolina SIPs, which provide the law underlying the enforcement actions in this case, include EPA-approved PSD programs that are based on the requirements of those EPA regulations. See N.C. Admin. Code tit. 15A r.2D.0530; S.C. Code Ann. Regs. 61-62.5, std. 7; see also 47 Fed. Reg. 7836 (1982) (approving original North Carolina PSD

creased emissions solely by applying an actual annual emissions test to the types of projects at issue in this case.

a. By statute, PSD applies to the construction or modification of "major emitting facilit[ies]," defined by reference to specified types of stationary sources. 42 U.S.C. 7475(a), 7479(1). EPA's PSD regulations require a pre-construction permit for the construction of any "major stationary source" or "major modification." 40 C.F.R. 51.166(i). The PSD regulations define "major modification" as:

> any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.

40 C.F.R. 51.166(b)(2)(i).

The inquiry under that definition first requires identification of a "physical change in or change in the method of operation." At that step, there is an "hours of operation" exclusion, which provides that "[a] physical change or change in the method of operation shall not include * * * [a]n increase in the hours of operation or in the production rate." 40 C.F.R. 51.166(b)(2)(iii)(*f*).

If there is a physical or operational change, the inquiry considers whether it would result in a "[n]et emissions increase," which is defined in relevant part as "[a]ny increase in actual emissions from a particular physical change or change in the method of operation of a stationary source." 40 C.F.R. 51.166(b)(3)(i)(*a*). Pre-change "actual emissions" equal "the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of

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regulations); 47 Fed. Reg. 6017 (1982) (same for South Carolina); 60 Fed. Reg. 51,923 (1995) (North Carolina incorporation of 1992 amendments of EPA's rules).

normal source operation." Actual emissions are "calculated using the unit's actual operating hours, production rates and types of materials processed, stored, or combusted during the selected time period." 40 C.F.R. 51.166(b)(21)(ii).

To determine whether there has been an "increase in actual emissions from a particular physical change," 40 C.F.R. 51.166(b)(3)(i)(*a*), the pre-project average annual emissions must be compared to the post-project average annual emissions. Because the PSD permit must be obtained before commencement of construction or modification, the post-project emissions must be projected or otherwise estimated. Recognizing that in some circumstances future actual emissions would be difficult to predict, 56 Fed. Reg. 27,633 (1991), the 1980 regulations provided: "For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date," which refers to the unit's "maximum capacity * * * to emit a pollutant under its physical and operational design." 40 C.F.R. 51.166(b)(4) and (21)(iv). Thus, for units that had not begun normal operations, past actual annual emissions were compared to future maximum potential emissions—an "actual-to-potential" comparison.

In *Wisconsin Electric Power Co.* v. *Reilly*, 893 F.2d 901, 913 (7th Cir. 1990) (*WEPCO*), the court held that a utility that engaged in like-kind replacement of aging equipment had in fact "begun normal operations" and therefore did not come within the "potential to emit/maximum capacity" regulation. Accordingly, the court required a more "realistic" approach that would examine "the maximum emissions that can be generated while operating the source as it is intended to be operated and as it is normally operated." *Id.* at 916, 918 (citation omitted). On remand, EPA estimated WEPCO's future total annual emissions "based on all the available facts in the record," taking into account how much the unit was likely to be

used and what the rate of emissions would be—typically referred to as the "actual-to-projected-actual" test. J.A. 68-72; 56 Fed. Reg. at 27,633 & n.10; 57 Fed. Reg. at 32,317 & n.10.

b. The NSPS regulations, by contrast, provide that a "modification" is "any physical or operational change * * * which results in an increase in the emission rate to the atmosphere of any pollutant." 40 C.F.R. 60.14(a). The "emission rate" is defined as the maximum hourly emissions from the relevant piece of equipment operating at its maximum achievable capacity. 40 C.F.R. 60.14(b); 40 C.F.R. 60.14(h) (1993); *WEPCO*, 893 F.2d at 913. The emission rate is "expressed as kg/hr." 40 C.F.R. 60.14(a) and (b). The NSPS emissions test thus determines whether an "increase in the emission rate" has occurred by comparing maximum hourly emissions at maximum capacity both before and after the change. Because it considers only maximum hourly rates, the NSPS test is not triggered by changes that increase emissions due only to increased hours of operation.

c. In 1992, in response to the *WEPCO* decision, EPA issued amendments to the 1980 PSD regulations that "clarif[ied] its methodology for calculating emissions increases" for electric utilities that "had begun normal operation." 57 Fed. Reg. 32,314, 32,323 (1991). The 1992 amendments generally provided that utility units that satisfy certain requirements should use the actual-to-projected-actual test rather than the actual-to-potential test, regardless of whether or not they had "begun normal operations." 56 Fed. Reg. at 27,633 & n.10; 57 Fed. Reg. at 32,323; 40 C.F.R. 51.166(b)(21)(v) (1993). The 1992 regulations also added a provision to the definition of "actual emissions" providing that, for electric generating units, actual emissions after the change equal the "representative actual annual emissions" of the unit. 40 C.F.R. 51.166(b)(21)(v) (1993). "Representative actual annual emissions" is defined similarly to "actual emissions" and means

"the average rate, in tons per year, at which the source is projected to emit a pollutant for the two-year period" after a change." 40 C.F.R. 51.166(b)(32) (1993). It considers "the effect any such change will have on increasing or decreasing the hourly emissions rate and *on projected capacity utilization.*" *Ibid.* (emphasis added).

The preamble to the 1992 regulations explained that for electric generating units, both NSPS and PSD calculations start with the hourly emission rate but differ in that the PSD calculation then multiplies "the hourly emissions rate times the utilization rate, expressed as hours of operation per year." 57 Fed. Reg. at 32,316 & n.6. The 1992 regulations retain the actual-to-potential test for other types of sources where a unit "has not yet begun normal operations." 40 C.F.R. 51.166(b)(21)(iv) (1993).

d. In 1996, pursuant to a conditional settlement agreement with parties who had challenged the 1980 PSD regulations, EPA proposed a "potential-to-potential" PSD test that was based on maximum hourly emissions, similar to the NSPS test. 61 Fed. Reg. 38,268-38,270 (1996); see 67 Fed. Reg. 80,204-80,205 (2002); 70 Fed. Reg. 61,081, 61,098 (2005). In 2002, however, EPA determined not to adopt the 1996 proposal, and instead issued revised PSD regulations that retained the actual-to-projected-actual test for existing utilities and broadened its applicability to all existing sources. 67 Fed. Reg. 80,186, 80,275 (2002); 40 C.F.R. 51.166(a)(7)(iv)(*c*) (2003).

3. Pursuant to CAA Section 307(b)(1), Duke and other electric utility companies, as well as other interested parties, filed various petitions for review in the D.C. Circuit challenging the 1980, 1992, and 2002 NSR regulations. Ultimately, those challenges were consolidated into a single action.

On June 24, 2005, the D.C. Circuit issued its ruling on those consolidated challenges in *New York*, 413 F.3d 3. The

decision expressly rejected the utility companies' challenges to the 1980 and 2002 regulations' definition of "major modification" under the PSD program, including their claim that the 1980 and 2002 NSR rules were invalid to the extent their definition of "modification" differed from a pre-1977 NSPS definition of that term. *Id.* at 18, 20. (Although the D.C. Circuit did not expressly address the 1992 regulations, they are identical in relevant respects to the 2002 regulations.) The court acknowledged the holding of the Fourth Circuit in this case that "Congress intended to require that EPA use identical regulatory definitions of modification across the NSPS and NSR programs," but found that the argument accepted by the court of appeals here "was not made by industry petitioners in their opening brief and is therefore waived." *Ibid.*

4. Duke is an energy company; it operates 30 coal-fired generating units at eight electric power plants in North and South Carolina that began service before 1977. Pet. App. 24a. In 2000, the United States brought this suit against Duke, alleging that Duke executed 29 "modifications" at its coal-fired plants between 1988 and 2000 without complying with PSD. *Id.* at 22a, 25a. One representative project was the subject of the plaintiffs' summary judgment briefing: Unit 4 at Duke's Buck plant. Buck 4, which had been placed in "cold shutdown" status, J.A. 227, was part of Duke's "Plant Modernization Program," in which Duke sought to undertake "necessary plant modifications and maintenance" to "extend[] [the] operating life" of units that normally "would be retired and scrapped." J.A. 204, 227, 229, 232. After Duke spent some $17 million to rehabilitate Buck 4, it resumed commercial operation in 1995, C.A. App. 785, 789, 790, more than a decade after it was placed in shutdown status. J.A. 227.

Three private groups (petitioners in this Court) intervened as plaintiffs. Pet. App. 6a. On cross-motions for summary judgment, the district court rejected EPA's argument

that its regulations permissibly measured PSD emissions increases based on an actual annual emissions test. *Id.* at 58a-72a. Rather, the court held that the PSD requirements are triggered only when a unit's maximum hourly emission rate increases, regardless of whether actual annual emissions increase due to increased hours of operation. The district court concluded that Congress, by cross-referencing the NSPS definition of "modification" in the PSD program in 1977, incorporated the 1977 NSPS regulations into the statutory definition of "modification" for PSD. *Id.* at 62a-67a. The court also concluded that the "hours of operation" exclusion in the PSD regulations itself required the application of an hourly-rate test. *Id.* at 59a-62a. Because the United States and petitioners did not contend that Duke's projects resulted in increases in maximum hourly emission rates, the district court entered final judgment for Duke. *Id.* at 87a-95a.

5. The court of appeals affirmed, but on different reasoning. Pet. App. 1a-19a. The court held that Congress's decision to define "modification" in the PSD provisions by cross-reference to the NSPS statutory definition requires EPA to interpret the term consistently in the two programs. The court believed that its analysis was dictated by *Rowan Cos.* v. *United States*, 452 U.S. 247 (1981), which held that Congress intended substantially identical definitions of the term "wages" in two different tax statutes to be interpreted to mean the same thing. Pet. App. 11a-14a. In the court of appeals' view, "Congress' decision to create identical statutory definitions of the term 'modification' has affirmatively mandated that this term be interpreted identically in the two programs. The different purposes of the NSPS and PSD programs cannot override that mandate." *Id.* at 17a-18a.

Although the court of appeals held that "modification" must be interpreted consistently in both programs, it did not hold that the statute mandated any particular definition. The

court concluded that the PSD regulations "could even be enforced as the EPA urges provided that, as long as the PSD and NSPS statutes define 'modification' identically, the NSPS regulations are similarly interpreted and enforced." Pet. App. 15a n.7. However, because the NSPS regulations were in place at the time EPA promulgated the 1980 PSD regulations and, unlike PSD, defined "modification" to include only projects that increase a plant's hourly emissions rate, the court of appeals concluded that EPA "must * * * interpret its PSD regulations defining 'modification' congruently" with the NSPS regulatory definition. Pet. App. 18a.

The court of appeals recognized that, under 42 U.S.C. 7607(b), it lacked jurisdiction to invalidate the PSD regulations. Pet. App. 15a n.7. The court reasoned, however, that "no question of the validity of the PSD regulations is * * * presented here," because "the PSD regulations can be interpreted consistently with pre-existing principles—the NSPS regulations—as the district court demonstrated and as the EPA's Director of the Division of Stationary Source Environment twice opined shortly after promulgation of the regulations." *Ibid.* Although the United States had informed the court that the identical issue was pending before the D.C. Circuit in *New York*, the court of appeals did not address the relationship of its ruling to those ongoing proceedings.

6. In October 2005, EPA proposed to revise the test for determining when projects at existing electric generating units constitute a PSD "modification" by adopting a test similar to the NSPS test that would apply prospectively to future modifications. 70 Fed. Reg. 61,081. The proposed regulation, if adopted, "would establish a uniform emissions test nationally under the NSPS and NSR [including PSD] programs for existing" electric generating units. *Ibid.* In issuing the proposed regulation, EPA stated that it continued to believe that the agency has "the authority to define 'modification' differ-

ently in the NSPS and NSR programs." *Id.* at 61,083 n.3, 61,090. The proposed rules were formulated to take into account changing conditions and air quality programs developed since 1980 to reduce emissions. *Id.* at 61,099.[3]

This latest proposal is part of EPA's ongoing evaluation of the PSD regulatory program. EPA has made adjustments to the program throughout the years as part of its continuing responsibility to "consider varying interpretations and the wisdom of its policy." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 863-864 (1984). EPA believes that, under its broad discretion to implement the PSD program, it can continue to address difficulties or challenges that arise in the program, as well as improvements in air quality achieved through implementation of other programs under the CAA, through the rulemaking process.

SUMMARY OF ARGUMENT

I. Under Section 307(b)(1) of the Act, "[a] petition for review" of any nationally applicable regulations or final action of the EPA "may be filed only in the United States Court of Appeals for the District of Columbia." 42 U.S.C. 7607(b)(1). Under Section 307(b)(2), "[a]ction of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement." 42 U.S.C. 7607(b)(2). Because the court of appeals' ruling had the effect of invalidating EPA's regulations as contrary to the statute, and because review of that issue "could have been"—and in fact

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[3] Since 1980, a number of new programs that improve air quality have come into existence. Those programs include the Acid Rain Program, 42 U.S.C. 7651-7651*o*, the NOx SIP Call (63 Fed. Reg. 57,356 (1998)), and the Clean Air Interstate Rule (CAIR), promulgated by EPA in 2005 to reduce interstate transport of SO_2 and NO_x emissions. See 70 Fed Reg. 25,162.

was—"obtained" in the D.C. Circuit, Section 307(b)(2) precluded review of that issue in this enforcement proceeding.

The court of appeals held that the statute requires EPA to adopt the same test for a PSD "modification" that it applies to determine whether a modification has occurred under the NSPS program. In the court's view, its adjudication of that issue was permissible under Section 307(b)(2) because the PSD regulations were open to an interpretation under which they applied the same test as the NSPS regulations. The court of appeals was mistaken.

First, the only reasonable construction of EPA's regulations is that they apply a different test under the two programs, and the court of appeals' holding that they must apply a consistent test thus amounts to an invalidation of the regulations, forbidden by Section 307(b)(2) in an enforcement action. Under the PSD regulations applicable here, a modification occurs if a physical or operational change results in an increase in actual annual emissions, which could occur when a covered change would result in an increase in hourly emissions, an increase in hours of operation, or both. By contrast, under the NSPS regulations, a modification occurs only if there is an increase in maximum achievable hourly emissions. The differences in the tests applied under the two programs are apparent from the significantly different wording of the two sets of regulations, the consistent use of an *annual* measure of emissions in the PSD regulations and an *hourly* measure in the NSPS regulations, and other regulatory provisions. The differences are also apparent from statements made by EPA in promulgating the 1980 and 1992 regulations.

The court of appeals mentioned two bases for its belief that the PSD regulations are open to an "hourly rate only" interpretation: the "hours of operation" exception in the regulatory definition of "major modification," and statements by a mid-level EPA official in 1981. As every other court of ap-

peals to examine those sources has concluded, however, the regulatory exception by its terms is an exception only from what constitutes a "physical change or change in the method of operation" at the first step of the "modification" inquiry, and is not relevant to the inquiry into the net emissions increase at the second step. Once it has been established that there has been a physical or operational change, as in this case, the regulatory exception has no application. As the other courts of appeals have also concluded, the statements by the EPA official were not authoritative and were mistaken.

Even if the "hours of operation" exclusion did require an "hourly rate only" interpretation, the court of appeals' holding would still be inconsistent with important aspects of the PSD definition of "modification," and the court therefore still lacked jurisdiction to consider the issue. While a covered change that results in no net increase of emissions is not a PSD "major modification," such a change could be a "modification" under the NSPS regulations if the particular unit's maximum *hourly* emissions rate increased. Moreover, an "increase" is counted under the PSD program only if it exceeds specified threshold emissions levels; the NSPS regulations contain no analogous provision.

In any event, there is a straightforward basis for concluding that review "could have been obtained" in the D.C. Circuit—and is thus barred here under Section 307(b)(2): Duke and other industry parties *actually did bring* substantially the same challenge in the D.C. Circuit. In the *New York* action, Duke and other industry petitioners raised, briefed in part and waived in part, and ultimately lost the issue decided below: whether EPA's use of an actual annual emissions increase test under the PSD program was unlawful because the CAA required EPA to apply instead the NSPS maximum hourly emissions test. Review of that issue was accordingly unavailable here.

II. Assuming, *arguendo*, that the court of appeals did not exceed its jurisdiction, the court nonetheless erred in its ruling on the merits. The court of appeals accepted that the statutory definition of "modification" contains some ambiguities that would ordinarily be up to EPA to resolve, and it also accepted that EPA could apply a total-annual-emissions test for modifications. Those conclusions should have sufficed to resolve this case in EPA's favor. But the court held that EPA must apply the same test for both NSPS and PSD purposes, based solely on the fact that Congress had cross-referenced the programs, providing in the PSD provisions that the term "construction" includes modification "as defined in" the NSPS statutory provisions. 42 U.S.C. 7479(2)(C).

That conclusion reflects a fundamental misapplication of *Chevron*. Congressional use of an ambiguous term reflects a delegation of authority to the agency to resolve ambiguities. Having found the relevant terms ambiguous, the court of appeals should have found Congress's repeated use of that term, through a cross-reference, to reflect repeated delegations. Instead, the court treated the cross-reference as limiting agency discretion.

The court below focused on the fact that the statute provides, for purpose of the PSD program, that "construction" includes modification "as defined in" the NSPS statutory provisions. 42 U.S.C. 7479(2)(C). That instruction is not meaningfully different from repeating the NSPS definition verbatim in the PSD provisions. Accordingly, it triggers the "identical terms" maxim, under which identical terms in different parts of the same statute are presumed to have identical meanings. In a long line of cases, however, this Court has found that maxim to be overridden by other considerations of statutory context, and it has frequently cautioned that the maxim is rarely dispositive. Accordingly, while a court that is faced with the need to construe a statute in the first in-

stance may, with caution, employ the "identical terms" maxim in conjunction with an examination of the surrounding statutory context, that maxim alone is not sufficient to establish that Congress had a "clear intent" on whether the identical terms must be construed identically by a regulatory agency. The maxim is insufficient to establish that Congress left no ambiguity for the agency to resolve.

This Court's pre-*Chevron* decision in *Rowan Cos.* v. *United States*, 452 U.S. 247 (1981), cited by the court of appeals as the sole support for its ruling, is not to the contrary. The court in *Rowan* did not simply apply the "identical terms" maxim, but carefully analyzed the legislative histories of the statutes at issue and placed great weight on the lack of contemporaneous administrative constructions that would contradict that maxim. Neither consideration is of significance here. In any event, *Rowan* establishes at most that a court, faced with the need to arrive at its own construction of a statute, may in some cases use the "identical terms" maxim. It does not support the court of appeals' conclusion that that maxim, taken by itself, is sufficient to establish that Congress had a "clear intent" on the question at issue and therefore precluded the agency from resolving any ambiguity or filling any statutory gap.

In the specific context of the PSD program, moreover, Congress has required EPA to promulgate regulations and has set forth the goals and purposes of the PSD program. Those goals and purposes are not identical to the goals and purposes of the NSPS program, and Congress has therefore anticipated that EPA could adopt regulations that, *inter alia*, construe the component terms in the statutory definition of "modification" with sensitivity to the particular goals and purposes of the PSD program. The statute precludes the inference that Congress required that any and all ambiguities

in the definition of "modification" be resolved in identical ways for purposes of the PSD and NSPS programs.

ARGUMENT

I. THE COURT OF APPEALS LACKED JURISDICTION OVER THE CLAIM THAT THE STATUTE REQUIRES THE SAME REGULATORY DEFINITION OF "MODIFICATION" IN THE NSPS AND PSD PROGRAMS

A. If Review Of An Agency Action "Could Have Been Obtained" In The D.C. Circuit Under Section 307(b)(1), Such Review May Not Be Had As A Defense To A Civil Enforcement Action

Section 307(b)(1) of the CAA provides that "[a] petition for review of action of the Administrator in promulgating * * * any * * * nationally applicable regulations promulgated, or final action taken, by the Administrator under [the Act] may be filed only in the United States Court of Appeals for the District of Columbia," within 60 days of the notice of such action in the Federal Register. 42 U.S.C. 7607(b)(1). In such a review, "the court may reverse any such action found to be," *inter alia*, "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 42 U.S.C. 7607(d)(9)(C).

The judicial review mechanism established by Section 307(b)(1) is exclusive. Under Section 307(b)(2), "[a]ction of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement." 42 U.S.C. 7607(b)(2). Thus, as this Court has explained, "any agency action that was *reviewable* in the courts of appeals cannot be challenged in an enforcement proceeding, whether or not review was actually sought." *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 605 (1980) (emphasis added).

Reinforcing that rule, Congress further provided that "[n]othing in [the Act] shall be construed to authorize judicial review of regulations or orders of the Administrator under [the Act], except as provided in [Section 7607]." 42 U.S.C. 7607(e).

The exclusive review provisions of Section 307(b) promote the "even and consistent national application" of EPA regulations, S. Rep. No. 1196, 91st Cong., 2d Sess. 40-41 (1970), thus serving "twin congressional purposes" of insuring CAA standards are "uniformly applied and interpreted" and "would be quickly reviewed by a single court intimately familiar with administrative procedures." *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 284 (1978). Section 307(b) thereby avoids inconsistent results and forum shopping, provides speedy and authoritative review in a court of appeals with particular expertise in the relevant area, and ensures that regulated entities are treated consistently throughout the country, thus ensuring a level playing field for the regulated community. See *Harrison*, 446 U.S. at 593; *NRDC* v. *EPA*, 512 F.2d 1351, 1356-1357 (D.C. Cir. 1975); *Lubrizol Corp.* v. *Train*, 547 F.2d 310, 317 (6th Cir. 1976).

Congress intended the preclusive effect of Section 307(b) to be strictly enforced. In the 1977 Amendments, Congress responded to a recommendation by the Administrative Conference of the United States, 41 Fed. Reg. 56,767-56,768 (1976), and amended Section 307(b) to expand the statutory limitations period from 30 to 60 days. In recommending that change, the relevant House committee "reaffirm[ed] its intent to strictly limit Section 307 challenges to those which are actually filed within that time." H.R. Rep. No. 294, 95th Cong., 1st Sess. 322 (1977). The committee expressly rejected other changes recommended by the Administrative Conference, including one "to permit the validity of a regulation to be challenged in defense to an enforcement proceeding." *Id.*

at 324; see 41 Fed. Reg. at 56,768; see also *Harrison*, 446 U.S. at 591 (noting that committee "expressly disclaimed an endorsement of the recommendations of the Administrative Conference" on certain matters).

B. The Claim That The PSD Regulations Must Be Consistent With The NSPS Regulatory Definition Of "Modification" Goes To The Validity Of The PSD Regulations And Could Have Been Heard By The D.C. Circuit

In this case, the court of appeals rejected EPA's interpretation of the PSD regulations and held instead that, by virtue of the *statutory* definition of "modification," EPA "must interpret th[e] term [modification] in a consistent manner in the NSPS and PSD regulations." Pet. App. 18a-19a; see *id.* at 11a. The court further concluded that its holding did not intrude upon the D.C. Circuit's exclusive jurisdiction to hear challenges to EPA's regulations under the CAA. Pet. App. 15 n.7. In the court's view, its newly minted requirement of consistency between the PSD and NSPS regulations, and the resulting rejection of EPA's regulatory interpretation, did not affect "the validity of the PSD regulations" because "the PSD regulations can be interpreted consistently with preexisting principles—the NSPS regulations—as the district court demonstrated and as the EPA's Director of the Division of Stationary Source Enforcement twice opined shortly after promulgation of the PSD regulations." *Ibid.*

The court of appeals' jurisdictional theory rests on a flawed premise. As the court of appeals itself recognized, its assertion of jurisdiction rests on the belief that the emissions increase test set forth in the PSD regulations can be interpreted identically with the maximum hourly emissions approach contained in the NSPS regulations. That belief is unfounded. The only reasonable interpretation of the PSD regulations is that they define "modification" differently from

the NSPS regulations. Moreover, the district court's reliance on the "hours of operation" exclusion was wholly misplaced. And the court of appeals overlooked additional differences between the PSD and NSPS regulatory definitions of "modification." Accordingly, the court of appeals was simply wrong that its holding that "modification" must be construed "congruently" under the two programs, Pet. App. 18a, did not invalidate the PSD regulations. As the court of appeals itself implicitly recognized, it lacked jurisdiction to issue a decision that necessarily invalidated the PSD regulations.

1. The only reasonable construction of the PSD regulations is that a physical change that increases a source's hours of operation is a "modification"

The regulations that govern this case are the 1980 and 1992 regulations. See pp. 4-8, *supra*.[4] Both versions determine whether a change has increased emissions solely by applying the same actual, annual emissions test to the types of projects at issue in this enforcement action.

a. EPA's PSD regulations define a "major modification," which under the regulations may trigger the need for a PSD permit, as

> any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.

40 C.F.R. 51.166(b)(2)(i). "Net emissions increase" is defined in relevant part as "any increase in actual emissions from a

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[4] The court of appeals stated that "the parties agree" that "[t]he 1980 regulations * * * control the projects at issue here." Pet. App. 5a n.1; cf. *id.* at 36a. The government did take the position that the 1980 and 1992 regulations did not materially differ with respect to the legal question at issue here. But the government clearly informed the courts below that some of the projects in this case were governed by the 1992 regulations. See Gov't C.A. Br. 6.

particular physical change or change in the method of operation of a stationary source." 40 C.F.R. 51.166(b)(3)(i)(*a*). By focusing on "net emissions increase[s]" and "actual" emissions, the PSD regulations focus on the total amount of pollutants actually released into the atmosphere as the result of a physical change. It does not matter, under the PSD regulations, whether the increase comes from an increased hourly rate of emissions or a decreased hourly rate that is more than offset by increased hours of operation.

By contrast, the corresponding provision of the NSPS regulation is worded quite differently. The NSPS regulation provides that, with exceptions not applicable here,

> any physical or operational change to an existing facility which results in an *increase in the emission rate to the atmosphere* of any pollutant to which a standard applies shall be considered a modification within the meaning of section 111 of the Act.

40 C.F.R. 60.14(a) (emphasis added). The NSPS regulation does not refer to "net emissions increase" or "actual" emissions; instead, it focuses on the hourly rate and makes clear that a modification occurs only if the "emission rate," measured in kilograms per hour, see 40 C.F.R. 60.14(b), increases as the result of a physical change. If EPA had wanted the presence of a major modification in the PSD regulations to turn only on physical changes that result in hourly rate increases, and not increases in hours of operation, it could have simply adopted the NSPS regulations for the PSD program as well. It likewise could have adopted different regulatory language that focused on hourly emission rates. Instead, EPA adopted PSD regulations focused on the total amount of emissions and so embraced a quite different concept of "modification" for use in the PSD program.

b. Other aspects of the PSD regulations confirm that the regulatory "actual emissions" test is triggered when a physical change results in increased actual annual emissions, whether because of an increase in hourly rate of emissions or an increase in hours of operation or some combination of the two. Actual emissions "shall be calculated using the unit's actual operating hours, production rates and types of materials processed, stored, or combusted during the selected time period." 40 C.F.R. 51.166(b)(21)(ii). Thus, if the "actual operating hours" or "production rates" increase as a result of a physical or operational change, then the actual annual emissions would increase as well. Moreover, the PSD regulations require that "actual emissions" be calculated annually, in tons per year, based on periods that are "representative of normal source operation." See *ibid.* The use of an annual measure, as well as the reference to a time period "representative of normal source operation," further emphasize the focus in the regulations on the actual annual emissions from the source, not merely the rate per hour of emissions.[5] In addition, only a physical or operational change that results in a "significant net emissions increase" triggers PSD. 40 C.F.R. 51.166(b)(2)(i); cf. 40 C.F.R. 60.14(b) (requiring use of kilograms per hour, not tons per year, to determine if there is an increase in "emission rate," and therefore a modification, under NSPS). A net increase is "significant" under the PSD regulations if it would exceed specified amounts of particular pollutants, which are expressed in "tons per year," not the hourly rate of emissions. 40 C.F.R. 51.166(b)(23)(i).

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[5] The focus on "representative" operations also makes clear that the PSD reuglations are not, like the NSPS regulations, focused on *maximum* hourly rates. There is no reason to suspect that representative operations will be at maximum capacity, and a regime focused on maximum hourly rates would have no reason to assess representative operations. That assessment, of course, is critical in assessing likely future emissions for an "actual to actual" comparison.

Finally, unlike the NSPS regulations, the PSD regulations provide for "netting" of emissions changes in making the major modification determination. Only a physical or operational change that results in a "significant net emissions increase" triggers PSD. 40 C.F.R. 51.166(b)(2)(i). Whether there is a "net" increase is determined by examining any creditable contemporaneous decreases and increases in actual annual emissions at the source. 40 C.F.R. 51.166(b)(3)(i). Thus, an increase caused by a particular physical or operational change may generally be offset by a contemporaneous decrease. The provision for "netting" reinforces the emphasis in the PSD regulations on the actual annual emissions into the atmosphere, not the measure of maximum hourly emissions from a unit.

The EPA's own official statements regarding the 1980 regulations demonstrated that an increase in actual emissions resulting from a qualifying physical or operational change may be a modification, regardless of whether the change results in increased hours of operation or increased emissions during the same hours of operation. The preamble to the 1980 regulations provided a detailed example of how the PSD regulations would work. It recites the case of a source that both adds a new emission unit and "plans to increase the hours of operation" at its existing unit above the level allowed in its existing permit. 45 Fed. Reg. at 52,705. EPA explained that "*both* changes will result in significant net increases in actual emissions" and therefore "*[b]oth* changes then qualify as modifications." *Ibid.* (emphasis added).[6] The example

[6] The hypothetical also provides an example of how the "hours of operation" exclusion, discussed in further detail below, is intended to function. Normally a simple increase in hours of operation in response to increased demand for a product is excluded from the regulatory definition of a physical or operational "change." However, because the increased hours of operation described in the example required a permit change, the increase was considered an operational "change," under the express terms of the regulatory exclusion. See 45 Fed.

makes clear that a modification may result from either an increase in hourly emissions or in hours of operation.[7]

c. In 1992, EPA promulgated new regulations that govern some of the projects at issue in this case. In the 1992 preamble, EPA confirmed that a physical or operational change that results in an actual increase in emissions is a "modification" under the PSD program, even if the change does not increase the hourly rate of emissions. As EPA explained, "[a]lthough a source may vary its hours of operation or production as part of its everyday operations, an increase in emissions attributable to an increase in hours of operation or production rate which is the result of a construction-related activity is not excluded from review." 57 Fed. Reg. at 32,328.

Furthermore, the preamble compares the NSPS and PSD tests, noting that they are "largely the same" in determining "whether a physical or operational change will occur," but that in the second step, "the applicable rules branch apart," with the "NSPS program examin[ing] maximum hourly emis-

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Reg. at 52,705; 40 C.F.R. 51.166(b)(2)(iii)(*f*) (excluding hours-of-operation increase from "physical change or change in the method of operation" "unless such change would be prohibited under any federally enforceable permit condition" established under certain regulations).

[7] Aside from the court of appeals in this case, the other courts of appeals that have addressed the issue have concluded that a physical or operational change that results in increased emissions because of increased hours of operation is a "modification" under the regulations. See *WEPCO*, 893 F.2d at 915, 918 ("Unlike NSPS, PSD is concerned with changes in *total annual emissions*, expressed in tons per year"; PSD measures "the maximum emissions that can be generated while operating the source as it is intended to be operated and as it is normally operated") (quoting *United States* v. *Louisiana-Pac. Corp.*, 682 F. Supp. 1141 (1988)); *Puerto Rican Cement Co.* v. *EPA*, 889 F.2d 292, 297 (1st Cir. 1989) (Breyer, J.) (noting that "EPA has simply taken account of * * * the fact that a firm's decision to introduce new, more efficient machinery may lead the firm to decide to *increase the level of production*, with the result that, despite the new machinery, overall emissions will increase.").

sion rates, expressed in kilograms per hour," and the PSD program "examin[ing] total emissions to the atmosphere," which "are determined by changes in annual emissions as expressed in tons per year." 57 Fed. Reg. at 32,316.[8]

2. *The "hours of operation" exclusion does not support the court of appeals' conclusion that the regulations can be read to require that only an hourly-rate increase in emissions is a "modification"*

The court of appeals did not itself attempt to explain how the 1980 or 1992 regulations could be read to be consistent with the NSPS definition of "modification." The court instead relied on the district court's analysis of the "hours of operation" exclusion, and on the views expressed by a single EPA official. Pet. App. 15a n.7. Neither the district court's rationale, however, nor the EPA official's views establish that,

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[8] The 1980 PSD regulations originally established a test for "any emissions unit which has not begun normal operations on the particular date" under which actual pre-change emissions were compared with "the potential to emit of the unit on that date," *i.e.*, the maximum potential post-change emissions. 40 C.F.R. 51.166(b)(21)(iv). The court in *WEPCO*, however, rejected that comparison, at least for like-kind replacements at electric utilities, suggesting instead a comparison between actual pre-change emissions and "a more realistic" assessment of post-change emissions. 893 F.2d at 917. On remand in *WEPCO*, the agency applied such an actual-to-projected-actual test, and it included that test for some categories in the 1992 regulations. See J.A. 57-79; 40 C.F.R. 51.166(b)(21) (1993). For present purposes, however, what is important is that both the actual-to-potential test and the actual-to-projected-actual test took either maximum potential post-change hours of operation (actual-to-potential) or likely post-change hours of operation (actual-to-projected-actual) into account in determining whether a change is a modification. Both tests focus on sums, not hourly rates. Neither test is consistent with a sole focus on hourly rate of emissions, since the hours of operation are not held constant under either test. Accordingly, the fact that the agency used both the actual-to-potential and the actual-to-projected-actual tests confirms that the agency's "actual emissions" definition of "major modification" does not limit major modifications to changes that produce an increase in hourly emissions.

notwithstanding the clear and unmistakable differences between "major modification" under the PSD regulations (with their focus on total emissions) and "modification" under the NSPS regulations (with their focus on hourly rate), the PSD regulations can be construed to adopt the NSPS test.

a. The district court held that the so-called "hours of operation" exclusion in the PSD definition of "major modification" requires EPA to keep hours of operation constant before and after the change in calculating emissions increases, such that there is an emissions increase under PSD only if there is a change resulting in increased hourly emissions. Pet. App. 59a-60a. That reading of the regulations conflates the two steps in the regulatory definition and is not tenable.

A "major modification" under the PSD regulations is "any physical change or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant." 40 C.F.R. 51.166(b)(2)(i). Applying that definition requires a two-step inquiry: first, a determination whether a project is a "physical or operational change;" second, whether such change "would result in a significant net emissions increase." See, *e.g.*, 57 Fed. Reg. at 32,316.

The definition of "major modification" has a number of exclusions from what constitutes a "physical change or change in the method of operation," at the first step of the inquiry. One such exclusion provides that, in general, "*[a] physical change or change in the method of operation* shall not include * * * [a]n increase in the hours of operation or in the production rate." 40 C.F.R. 51.166(b)(2)(iii)(*f*) (emphasis added). By its terms, that "hours of operation" exclusion is not an exclusion from the entire definition of "major modification," nor from the portion of the definition pertaining to emission increases at the second step of the analysis. Rather, it is an exclusion only from what constitutes a qualifying

"physical change or change in the method of operation" at the first step. Accordingly, a mere increase in hours of operation standing alone is not a "change," and the "modification" inquiry need proceed no farther.

By contrast, if there *has* been a "change" other than a mere increase in hours of operation or other excluded event, the inquiry proceeds to the second step: whether the proposed "change" "would result in a significant net emissions increase." The "hours of operation" exclusion has no application at that stage of the inquiry, because on its face it applies only to the "change" analysis, not the "emissions increase" analysis of a conceded "change." Thus, if the proposed "change" would result in a significant net emissions increase, it constitutes a "modification" for PSD purposes, even if the emissions increase is the result of the fact that the cognizable "change" will facilitate or lead to increased hours of operation rather than increased hourly emissions.

EPA explained in the preamble to the 1980 regulations that the exclusion applies to market fluctuations, not to increases in hours of operation made possible by a physical or operational change. The preamble explained:

> While EPA has concluded that as a general rule Congress intended any significant net increase in [actual] emissions to undergo PSD or nonattainment review, it is also convinced that Congress could not have intended a company to have to get a NSR permit before it could lawfully change hours or rate of operation. Plainly, such a requirement would severely and unduly hamper the ability of any company to take advantage of favorable market conditions.

45 Fed. Reg. at 52,704. In later statements, in 1988 and in promulgating the 1992 regulations, EPA reiterated that the "hours of operation" exclusion should be read in accordance

with its plain meaning, as a modest exclusion from what constitutes a "physical change or change in the method of operation" and that the exclusion has no effect when there has been a qualifying "change."[9] The "hours of operation" exclusion does not support the argument that the regulations can be read to limit a PSD "major modification" to cases in which there has been an increase in per-hour emissions.

b. Given the clarity of the regulatory language, and EPA's explanation of the exclusion in the regulatory preamble, it is immaterial whether, as the district court concluded (Pet. App. 60a-62a), a mid-level EPA official, Edward Reich, then-Director of the Division of Stationary Source Enforcement, interpreted the provisions differently in an internal memorandum and a letter written in 1981. See J.A. 27-28, 35-37. Even agency officials may misunderstand some details of newly promulgated regulations, and any such interpretation by Mr. Reich was plainly incorrect. That conclusion is reinforced when, as here, the letters provide no indication of the care or attention Mr. Reich gave to the issue and contain no explanation of how he arrived at his variant understanding.[10]

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[9] See J.A. 255 ("the exclusion for increases in hours of operation or production rate does not take the project beyond the reach of PSD coverage if those increases do not stand alone but rather are associated with non-excluded physical or operational changes"); J.A. 44 ("EPA has properly interpreted the PSD * * * regulations as applying to increases in emissions due to increases in hours of operation or production rate where, as here, such operational or production increases are closely related to physical or operational changes"); see also 57 Fed. Reg. at 32,328 (explaining in 1992 preamble that "[a]lthough a source may vary its hours of operation or production as part of its everyday operations, an increase in emissions attributable to an increase in hours of operation or production rate *which is the result of a construction-related activity* is not excluded from review") (emphasis added).

[10] If he had provided some analysis, the source of his misunderstanding might be more clear, as in the case of the district court, which clearly conflated the two distinct steps of the relevant regulatory definition.

The other courts of appeals to consider the scope of the "hours of operation" exclusion have correctly rejected arguments, based on the same 1981 misinterpretation by Mr. Reich, that the exclusion prohibits consideration of increases in hours of operation resulting from physical or operational changes in calculating emission increases under the PSD program. See *WEPCO*, 893 F.2d at 916 n.11 (exclusion "was provided to allow facilities to take advantage of fluctuating market conditions, not construction or modification activity"); *Puerto Rican Cement Co.* v. *EPA*, 889 F.2d 292, 298 (1st Cir. 1989) (Breyer, J.) (upholding EPA interpretation of exclusion as allowing sources "simply to increase their output" through "increased use of existing facilities" as opposed to increases resulting from construction or modification activity); see also *United States* v. *Ohio Edison Co.*, 276 F. Supp. 2d 829, 876-877 (S.D. Ohio 2003). The "hours of operation" exclusion does not alter the conclusion that a "modification" may occur not only when a physical or operational change results in an increase in per-hour emissions (without an offsetting decrease in hours of operation), but also when such a change results in increased hours of operation without any sufficiently offsetting decrease in the hourly emissions rate.

3. Even Under The District Court's Reading Of The "Hours Of Operation" Exclusion, There Are Inconsistencies Between The Treatment Of "Modification" In The PSD And NSPS Regulations

The district court's erroneous interpretation of the "hours of operation" exclusion is not the only flaw in the court of appeals' jurisdictional analysis. Even if the exclusion could reasonably be construed as the district court read it, the court of appeals' holding would still effectively invalidate important aspects of the PSD regulatory definition of modification, and the court therefore lacked jurisdiction to consider the issue.

In some instances, for example, expansion or refurbishment of an existing unit may increase the hourly emissions rate but also, by virtue of the modified unit's increased efficiency and productive output, enable the facility's owner to reduce operating hours and thereby avoid any increase in emissions on an annualized basis. Or, under the "net emissions" test in the PSD regulations, certain contemporaneous emissions reductions at a source may be used to offset emissions increases at a particular unit. 40 C.F.R. 51.166(b)(2)(i) and (3)(i). Under the NSPS regulations with their focus on hourly emission rates, such changes would generally qualify as "modifications." They would generally not qualify as "major modifications" under the PSD regulations, however, because the *total* projected annual emissions at the source as a whole had not increased. Neither the district court nor the court of appeals offered any analysis of the PSD regulations that could reasonably harmonize them with the NSPS regulations in those circumstances, and for good reason: none exists. The PSD regulations focus on the sum of total emissions, and the NSPS focus on hourly rates is simply inconsistent with that focus.

As discussed above, see pp. 20-23, *supra*, moreover, there are other substantial differences between the PSD and NSPS definitions of "modification," even assuming *arguendo* that the "hours of operation" exclusion could be interpreted in the unreasonable manner proposed by the district court. Thus, for example, the PSD regulations provide that only a "*significant* net emissions increase" is a PSD "major modification," and set forth various threshold emissions levels that will be deemed significant, measured in "tons per year." 40 C.F.R. 51.166(b)(2)(i) and (23)(i) (emphasis added). The NSPS definition of "modification," by contrast, contains no such requirement of a "significant" annual increase before a "modifi-

cation" will be found, and would thus be triggered in some circumstances in which the PSD definition would not.[11]

It is thus undeniable that, as promulgated by EPA, the PSD regulations define "modification" differently from the NSPS definition of "modification" in multiple and substantial respects. The decision of the court of appeals effectively invalidates the PSD regulations in those respects. Accordingly, the court of appeals lacked jurisdiction to consider the issue on which its judgment rests, because under Section 307(b)(1) and (2) only the D.C. Circuit has jurisdiction to entertain challenges to the PSD regulations.

4. Because Review Of The Claim That The PSD Regulations Must Be Consistent With The NSPS Regulations "Could Have Been Obtained" In A Petition For Review, That Claim Was Precluded Here

An examination of the challenges actually advanced by Duke and other industry petitioners in the D.C. Circuit proceedings confirms that the court below was jurisdictionally precluded from deciding the case as it did. Under Section 307(b)(2), "[a]ction of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceed-

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[11] Among other differences, the NSPS modification provision applies to "existing facilit[ies]," defined as "any apparatus of the type for which a standard is promulgated," see 40 C.F.R. 60.2, 60.14, while the PSD definition of "major modification" applies to any "major stationary source," defined as an entire plant or factory, see 40 C.F.R. 51.166(b)(1) and (2). The NSPS regulations include a capital expenditure requirement in the "production rate" exclusion, 40 C.F.R. 60.14(e)(2), while the PSD regulations do not, 40 C.F.R. 51.166(b)(2)(iii)(*f*), and the NSPS production rate exclusion is an exclusion from what constitutes a "modification[]," while the PSD exclusion is only from what constitutes a "physical change or change in the method of operation." Those differences too reinforce the emphasis in the PSD regulations, unlike the NSPS rule, on the actual annual amount emitted into the atmosphere, not the maximum achievable performance of a particular unit.

ings for enforcement." 42 U.S.C. 7607(b)(2). The CAA thus bars courts in enforcement proceedings (like this case) from entertaining challenges that could have been brought on a petition for review under Section 307(b)(1) in the D.C. Circuit. As this Court has emphasized, such courts simply cannot "pursue any of the * * * familiar inquiries which arise in the course of an administrative review proceeding." *Adamo Wrecking Co.*, 434 U.S. at 285.

Perhaps the clearest evidence that Duke could have brought its statutory challenge in the D.C. Circuit is that it in fact did so. During the course of the *New York* litigation in the D.C. Circuit, and beginning long before the United States brought this enforcement action, Duke and other industry petitioners raised, briefed in part and waived in part, and ultimately lost the question in this case. whether EPA's use of an actual annual emissions increase test under the PSD program was unlawful because the CAA required EPA to apply instead the NSPS maximum hourly emissions test.

The issue was first raised in 1981, when several industry parties filed opening briefs in their D.C. Circuit challenge to the 1980 PSD rules. One of those briefs, which was entitled "Brief for Industry Petitioners on Actual Emissions Definition of Net Increase" (Industry Br.), raised the question whether EPA's PSD regulations unlawfully "provided that a modification * * * would occur when actual emissions from a source increased as a result of an alteration to that source, even where the source's capacity to emit remains constant." Industry Br. at 1, *Chemical Mfrs. Ass'n* v. *EPA*, No. 79-1112, 1999 WL 1338364 (D.C. Cir. Dec. 15, 1999) (per curiam); see *id.* at 43. That brief criticized the PSD actual emissions test because it is a function "of the production rate at which the source operates" and "requires that variations in the source's hours and rates of operation be taken into account." *Id.* at 28-29. Thus, EPA's actual annual emissions test, including its

consideration of hours of operation, was subjected to industry challenge as early as 1981.

In 1982, the parties to the review proceedings in the D.C. Circuit entered into a conditional settlement agreement. That agreement required EPA to propose, and take final action adopting or rejecting for NSR purposes, "an NSPS-like hourly-potential-to-hourly-potential emissions increase test for modifications." 70 Fed. Reg. at 61,098. If adopted, that proposal would have provided industry with the very relief it sought in the D.C. Circuit—relief that it ultimately obtained only as a result of the court of appeals' decision in this case. Specifically, the proposal would have added PSD regulatory language allowing industry to measure emission increases by using an hourly emissions rate based on "the source's potential to emit (as calculated in terms of pounds of pollutant emitted per hour)." 61 Fed. Reg. at 38,255, 38,269. As EPA explained, under the proposed approach "the level of operations and actual emissions would generally *no longer* be pertinent" for NSR purposes. *Id.* at 38,269 (emphasis added).

EPA rejected the proposed changes in 2002. The Utility Air Regulatory Group (UARG), of which Duke is a member, filed a petition for review challenging that decision in the D.C. Circuit. See *Utility Air Regulatory Group* v. *EPA*, No. 03-1046 (filed Feb. 27, 2003). One of the issues raised by UARG was whether the 1980 NSR (and, thus, PSD) regulations were invalid "if the actual emissions test in the 1980 NSR rule does not require a physical or operational change that results in an increase in the maximum achievable emission rate of an existing unit." UARG Non-Binding Statement of Issue at 2, *New York*, *supra* (No. 02-1387); see Motion of Alabama Power Co. to Reopen Administratively Terminated Petitions for Review at 3-4, *Chemical Mfrs. Assn*, *supra* ("Whether the [1980 and 1992] NSR rules * * * are lawful, if it is permissible to interpret those rules, as EPA does today,

as providing that an increase in emissions at an existing unit that is attributable to the unit operating more hours can constitute a "major modification," where there is no relaxation of an enforceable limitation on the number of hours that the unit may operate."). Industry petitioners also raised the following challenge to the 1980 and 1992 NSR regulations:

> Whether, if the 1980 rules repealed the requirement that there must be an emission rate increase at an existing unit for there to be an NSR modification, the 1980 rules are unlawful?

Joint Brief of Industry Petitioners at 2, *New York*, *supra* (No. 02-1387)

On June 24, 2005, the D.C. Circuit ruled against industry petitioners, including Duke, expressly rejecting their "claim that modification must have the same regulatory meaning for NSR as prevailed for NSPS in 1977." *New York*, 413 F.3d at 19. The court held that the CAA did not compel EPA to apply the NSPS regulatory definition of emissions increases in measuring increases under the PSD program. *Id.* at 18-20. To be sure, although the court addressed the general claim that the Act precluded the actual annual increase standard, the court did not rule on the precise argument accepted by the Fourth Circuit in this case—that the Act requires that the term "modification" have a consistent meaning in both the PSD and NSPS programs. But the reason the court did not address that precise argument was that it "was not made by industry petitioners in their opening brief and is therefore waived." *Id.* at 20. The D.C. Circuit at no point indicated that the argument, had it been preserved, would have been unripe or otherwise not justiciable. Indeed, the fact that the court addressed, and rejected, other statutory-based arguments challenging the actual annual emissions test on their merits establishes that such claims were ripe for review. And

because review of challenges to the actual annual emissions test on the ground that it was contrary to the statute "could have been obtained" in a petition for review, it is unavailable in this enforcement action.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT EPA LACKS DISCRETION TO APPLY A REGULATORY TEST FOR PSD "MODIFICATIONS" THAT DIFFERS FROM THE NSPS REGULATORY TEST

Assuming *arguendo* that the court of appeals had jurisdiction to review the statutory validity of the annual actual emissions test applied by EPA under the PSD program, the court of appeals erred in invalidating that test. Congress's use of identical statutory definitions of "modification" for the PSD and NSPS programs indicates that it would have been *permissible* for EPA to adopt the same regulatory interpretation of "modification" for both programs, but it does not *compel* that result. Rather, to the extent that the statutory definition leaves ambiguities and gaps for EPA to fill, Congress authorized EPA to resolve those questions separately for purposes of the PSD and NSPS programs in any reasonable fashion consistent with the statute, in light of the distinct structure and purposes of the two programs. Because EPA's regulations did just that, the court of appeals owed deference to EPA's construction of the Act in the context of the PSD program, and the court should have held that the regulations' actual annual emissions standard is a permissible one.

A. EPA May Interpret The Statutory Definition Of "Modification," Including The Ambiguous Term "Increases," Differently To Effectuate The Distinct Purposes Of The Separate PSD And NSPS Programs

In reviewing an agency's construction of a statute, this Court asks "whether Congress has directly spoken to the precise question at issue" and, if Congress has instead been

"silent or ambiguous," whether "the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 842-843. Congress has not clearly spoken to the precise question at issue in this case: what constitutes an emissions "increase" for the purposes of determining whether a project is a "modification" under the PSD program. EPA's interpretation of that ambiguous term for PSD purposes is reasonable and entitled to deference.

1. The requirements of the PSD program apply to "construction" of covered facilities. 42 U.S.C. 7475(a). By the time the PSD provisions were enacted in 1977, the term "construction" had been defined for purposes of the pre-existing NSPS program. As originally enacted, however, the PSD provisions themselves did not define "construction." The PSD cross-reference to the NSPS definition was added three months later, as part of a set of 84 "Clean Air Act Technical and Conforming Amendments." Safe Drinking Water Amendments of 1977, Pub. L. No. 95-190, § 14(a)(54), 91 Stat. 1402. The new PSD definition provides that "[t]he term 'construction' when used in connection with any source or facility, includes the modification (as defined in [42 U.S.C.] 7411(a) * * *) of any source or facility." 42 U.S.C. 7479(2)(C). Thus, for both PSD and NSPS, the overarching statutory definition of "modification" is the same: a modification is "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. 7411(a)(4).

2. The statutory definition of "modification" leaves several constituent terms undefined, and therefore open to reasonable agency interpretation. Among them is the phrase at issue in this case: "increase[] the amount of any air pollutant." Although a change is not a "modification" unless it "increases" the amount of emissions, the statute "is silent on

how to calculate such 'increases' in emissions." *New York*, 413 F.3d at 22. There is substantial ambiguity in the term "increase" in this context and many ways to evaluate an "increase" in amount of pollutants. Such an increase could be measured by the minute, the hour, the year, or some other period. It could be measured in terms of actual amounts, average amounts, maximum possible amounts, estimates or projections of likely amounts, or some other metric.

Under the *Chevron* doctrine, that ambiguity grants the EPA the discretion to select the method of evaluation it thinks best, so long as EPA's action is reasonable and not inconsistent with the statute itself. Congress "did not specify how to calculate 'increases' in emissions, leaving EPA to fill in that gap while balancing the economic and environmental goals of the statute." *New York*, 413 F.3d at 27.

B. Congress's Use Of The Same Definition Of "Modification" In The Provisions Governing NSPS and PSD Does Not Eliminate EPA's Discretion To Resolve Ambiguities In That Definition In Different Ways For Each Program

The court of appeals accepted that the statutory definition of "modification" contains some ambiguities, and the court also accepted that EPA could validly construe the ambiguous term "increase" in that definition to yield the interpretation at issue in this case—an actual annual emissions, rather than a maximum hourly rate of emissions, test. See Pet. App. 15a n.7 ("The PSD regulations * * * could even be enforced as the EPA urges provided that * * * the NSPS regulations are similarly interpreted and defined."). Those conclusions should have sufficed to uphold the regulations under *Chevron*. But the court held that the EPA was precluded from construing "increases" to mean something different in the PSD program than in the NSPS program. In the court's view, because Congress had used a single definition for "modification" for use

in both programs, Congress had "directly spoken to the precise question at issue" of whether the component parts of that term could have somewhat different meanings for the PSD and NSPS programs and had decided that the meaning must remain constant. *Id.* at. 10a-11a (quoting *Chevron*, 467 U.S. at 842); see *id.* at 18a-19a. The court further held that, because the NSPS regulations were issued first, their construction of the term "modification" had to be used for the PSD program.[12]

1. The court of appeals gave only one reason for its conclusion that the statute unambiguously compels EPA to construe the constituent terms of the "modification" definition—in particular, the term "increases"—in the same way for the PSD and NSPS programs. According to the court, this Court's decision in *Rowan* established an "effectively irrebuttable" presumption that the term "increases" must be given a consistent meaning in the NSPS and PSD programs, because "Congress' decision to create identical statutory definitions of the term 'modification' has affirmatively mandated that this term be interpreted identically in the two programs." Pet. App. 17a. On that basis, the court of appeals concluded that Congress had "directly spoken" to the question before it.

2. The court of appeals was mistaken. As this Court has explained, at the first stage of the *Chevron* analysis, "when a statute speaks clearly to the issue at hand [a court] 'must give effect to the unambiguously expressed intent of Congress.'" *Barnhart* v. *Thomas*, 540 U.S. 20, 26 (2003); see *Household Credit Servs.* v. *Pfennig*, 541 U.S. 232, 242 (2004) (statute ambiguous under *Chevron* because it does not provide "a clear answer"). As the Court explained in *Chevron*, "[i]f the

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[12] The court of appeals provided no support whatever for its "first in time" rule, which was its sole basis for preferring the NSPS regulations over the PSD regulations. See Pet. App. 18a.

intent of Congress is clear, that is the end of the matter; the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-843; see *id.* at 843 n.9 (court "must reject administrative constructions which are contrary to clear congressional intent").

a. The Clean Air Act reveals no "unambiguously expressed intent of Congress" or "clear answer" with respect to the question whether the ambiguities in the definition of "modification" may be resolved differently in the NSPS and PSD contexts. The statute simply provides that "[t]he term 'construction' when used in connection with any source or facility, includes the modification (as defined in [42 U.S.C.] 7411(a)) of any source or facility." 42 U.S.C. 7479(2)(C). That shorthand reference is not meaningfully different from a repetition of the Section 7411(a) definition in Part C of the CAA (which establishes the PSD program), and it conveys no clear congressional command that EPA is to be denied the usual range of discretion conferred on agencies to resolve statutory ambiguities in ways reasonably tailored to each particular regulatory context. To the contrary, absent an express direction to treat two programs identically, Congress's repeated use of an ambiguous term reflects a repeated delegation, not a command of parity.

Even in the absence of an authoritative agency interpretation construing the same ambiguous statutory term differently in two different, but related, contexts, this Court's cases have frequently reached that result as a matter of judicial interpretation. And the Court has regularly cautioned against assuming, without careful examination of the context, that Congress's use of the same term in two provisions mandates that it be given the same meaning in each.

Thus, in *Atlantic Cleaners & Dyers* v. *United States*, 286 U.S. 427 (1932), the Court considered the meaning of the term "trade or commerce" in two different provisions of the

Sherman Act, 15 U.S.C. 1 *et seq.*—one in Section 1, forbidding any combination "in restraint of trade or commerce among the several states"; the other in Section 3, forbidding any combination "in restraint of trade or commerce in any Territory of the United States or of the District of Columbia." See 286 U.S. at 432. The court noted that "there is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning." *Id.* at 433. But the Court also explained that "the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *Ibid.* The Court thus held that the term "trade," while likely "synonymous" with the word "commerce" in Section 1, *id.* at 434, has the broader meaning of "occupation, employment, or business," in Section 3, *id.* at 436.

In a long line of cases, the Court has followed *Atlantic Cleaners* in recognizing that Congress's use of a single, ambiguous term in two contexts does not, by itself, signal a clear intent that the term must have the same meaning in each. For example, the Court in *Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 86-88 (1934), concluded that the term "obligations" has distinct meanings for the purposes of two provisions of the tax code—one that excluded interest on government "obligations" from income and a second that defined income for nonresident aliens to include interest on "obligations." In *United States* v. *Cleveland Indians Baseball Co.*, 532 U.S. 200, 212-216 (2001), the Court concluded that the term "wages paid" may have different meanings for purposes of the statutes governing social security and federal unemployment taxes than it has for purposes of the closely related statute governing eligibility for social security benefits. In *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 342-344 (1997), the

Court held that the term "employee" may include former employees for purposes of Title VII's prohibition of retaliation, while it refers only to current employees for purposes of some other provisions. See *Wachovia Bank* v. *Schmidt*, 126 S. Ct. 941, 951-952 (2006) (term "located" in statutes laying venue for actions against national banks has different meaning than same term in statutes governing federal question jurisdiction in such actions); *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U.S. 581, 596-597 (2004) (holding that "age" means "old age" in some provisions of Age Discrimination in Employment Act, 29 U.S.C. 623(a)(1), while it means "comparative youth" in nearby provision setting forth BFOQ defense); *District of Columbia* v. *Carter*, 409 U.S. 418, 421-425 (1973) (District of Columbia is a "State or Territory" under 42 U.S.C. 1982, but not under 42 U.S.C. 1983).

The principle that the same statutory term can be given different meanings in different contexts carries even greater force when, as here, the agency charged by Congress with responsibility for construing the statute has adopted different interpretations of a particular term in the exercise of its delegated rulemaking authority. As this Court recognized in *Chevron* itself, in upholding EPA's interpretation of the very statute at issue here, "the fact that the agency has adopted different definitions [of the same statutory term] in different contexts [in the Clean Air Act] adds force to the argument that the definition itself is flexible." 467 U.S. at 864. Thus, in *Cleveland Indians* this Court deferred to the agency's decision to give the same statutory term a different meaning, 532 U.S. at 218-220, and numerous decisions of the courts of appeals likewise recognize the authority of agencies to interpret identical statutory terms differently for different purposes.[13]

[13] Courts have recognized this general proposition in the specific context of the NSPS and PSD programs. *E.g.*, *Alabama Power*, 636 F.2d at 396 (holding that while Congress intended the same statutory definition of "stationary

b. To be sure, the Court has also concluded that the same term in two different provisions may be construed to have the same meaning. In *Rowan*, the sole case on which the court of appeals relied, Congress rejected a Treasury regulation defining "wages" for purposes of FICA and FUTA withholding to include the value of meals and lodging provided for the convenience of the employer, instead holding that "wages" excludes such meals and lodging, as in the income-tax withholding context. The Court noted that Congress had defined "wages" in "substantially the same language" in the income-tax withholding provisions as in the FICA and FUTA provisions. 452 U.S. at 255. But the Court did not rely merely on the fact that the same definitions were used. Instead, the Court undertook its own extensive analysis of the legislative histories of the statutes at issue, concluding that "[t]hese histories reveal a congressional concern for 'the interest of simplicity and ease of administration'" and that "one of the means Congress chose in order to promote simplicity was to base withholding upon the same measure—'wages'—as taxation under FICA and FUTA." *Ibid.*; see, *e.g.*, *id.* at 256 (quoting committee report explaining that Congress had "coordinated" the three tax provisions "in order to facilitate the work of both the Government and the employer in administering the withholding system"). Moreover, the Court, acting prior to *Chevron*, placed great weight on the lack of "substantially contemporaneous constructions of the statutes" supporting

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source" for PSD and NSPS modification purposes, EPA retained discretion to interpret the ambiguous component terms of the same definition differently for NSPS and PSD purposes); *Potomac Elec. Power Co.* v. *EPA*, 650 F.2d 509, 517-518 (4th Cir. 1981) ("stationary source" need not be defined the same for NSPS and PSD programs because of the "significant differences between the PSD and NSPS programs"), cert. denied, 455 U.S. 1016 (1982); cf. *WEPCO*, 893 F.2d at 904-905, 913 (noting that Congress "essentially adopted" the NSPS statutory definition of modification for the PSD program, but holding that "unlike NSPS," PSD focuses on increases in "total annual emissions").

Treasury's position. *Id.* at 262; cf. *Chevron*, 467 U.S. at 863 ("The fact that the agency has from time to time changed its interpretation of the term 'source' does not * * * lead us to conclude that no deference should be accorded the agency's interpretation of the statute. An initial agency interpretation is not instantly carved in stone.").

Rowan illustrates the commonsense proposition that when Congress uses the same terms in two different statutory contexts, Congress *may* have an intent to ensure "simplicity and ease of administration" and, *if* that intent can be substantiated and is not contradicted by other indices of congressional intent, a court may infer that Congress intended the term to have the same meaning in both contexts. But *Rowan*, which was decided before *Chevron* and does not apply the *Chevron* framework, does not suggest that, even where a court finds the "identical terms" maxim persuasive, the court would conclude that Congress had an "unambiguously expressed" or "clear" intent on the matter.[14] Rather, *Rowan*, especially when read in the context of the line of this Court's cases evidencing a distinctly skeptical view of the "identical terms" maxim, merely demonstrates that a court may use that maxim as one of many means by which it can determine the preferred interpretation of an ambiguous statute.

Under the *Chevron* framework, by contrast, when an administrative agency with delegated authority to construe the statute has resolved the statutory ambiguity, "the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative inter-

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[14] This Court's subsequent treatment of the very terms at issue in *Rowan* suggests that the "identical terms" maxim alone is never dispositive at *Chevron* step one. In *Cleveland Indians*, the Court returned to the same statutory terms at issue in *Rowan* and used a *Chevron* step-two analysis to defer to the Internal Revenue Service's reasonable interpretation of them. 532 U.S. at 209, 213-214.

pretation." *Chevron*, 467 U.S. at 843 (footnote omitted). Rather, *Chevron* teaches that "a court's opinion as to the best reading of an ambiguous statute an agency is charged with administering is not authoritative." *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 125 S.Ct. 2688, 2701 (2005). Where there is ambiguity, *Chevron* "requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation." *Id.* at 2699; see *Chevron*, 467 U.S. at 843 n.11 ("The court need not conclude that the agency construction was * * * even the reading the court itself would have reached if the question initially had arisen in a judicial proceeding."). As this Court's numerous cases rejecting the "identical terms" maxim illustrate, that maxim, taken by itself, is insufficient to establish that Congress directly addressed and clearly resolved the question whether the ambiguous, component terms of the definition of "modification" may have a somewhat different meaning in the PSD and NSPS contexts.

c. The court of appeals apparently believed that the "identical terms" maxim is "effectively irrebuttable" in the context of this case, because the terms at issue are found in a definition. Pet. App. 17a.[15] Words used in a definition, how

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[15] Aside from the "identical terms" maxim, the only other support suggested by the court of appeals for its conclusion was a single statement in a summary of amendments introduced into the Congressional Record by Senator Muskie and Representative Rogers that, as the court of appeals summarized, embodied an "expressed intent * * * to 'conform' the definition of modification in the PSD provisions 'to usage in other parts of the Act.'" Pet. App. 14a (quoting 123 Cong. Rec. 36,253 (1977)). The court made only the modest claim that that statement "indicates congressional concern with the same sort of simplicity and consistency that the *Rowan* Court discerned from the legislative history examined there." Pet. App. 14a-15a. The cited statement, however, in full observed that the amendment in question "[i]mplements conference agreement to cover 'modification' as well as 'construction' by defining 'construction' in

ever, are not subject to special rules of statutory interpretation or an emasculated version of the *Chevron* doctrine. Indeed, this Court has never suggested that its repeated warnings against reliance on the "identical terms" maxim apply only to statutory terms that are not defined. To the contrary, the Court has confirmed that different interpretations of a term remain permissible even where Congress mandates a single statutory definition of that term be used. In *Robinson*, the term "employee" was statutorily defined, and Congress instructed that the definition was to apply "for purposes of Title VII" of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* 519 U.S. at 342 (citing 42 U.S.C. 2000e(f))—a clearer statutory preference for a single definition than the vaguer "as defined in section 7411(a)" CAA provision at issue in this case. Notwithstanding the requirement that the single statutory definition be applied throughout Title VII, this Court held that the meaning of the defined term could differ for different provisions serving distinct purposes in Title VII.[16]

[PSD] to conform to usage in other parts of the Act." 123 Cong. Rec. at 36,331. To the extent that statement sheds any light on Congress's legislative purpose at all, it suggests only that the intention was to ensure that modifications be subject to PSD in the first place by defining construction to include the modification of existing sources. That goal is fully accomplished under the EPA's interpretation. The statement does not suggest that Congress directly addressed, and clearly resolved, the question whether ambiguities in the definition of "modification" must receive the same resolution in the NSPS and PSD programs.

[16] The decision below by the Fourth Circuit had specifically relied on the fact that the statute provided the definition of "employer" "for purposes of all provisions of Title VII" in holding that it must be interpreted identically for all purposes of the Act. *Robinson* v. *Shell Oil Co.*, 70 F.3d 325, 329 (1995), rev'd, 519 U.S. 337 (1997).

Id. at 343-344. The "identical terms" maxim does not acquire special force just because the terms are used in a definition.[17]

3. a. In any event, the PSD provisions themselves demonstrate that Congress intended EPA to have ample discretion to construe ambiguities in the PSD statutory scheme in a way that would be sensitive to the particular features and purposes of the PSD program. In several provisions, Congress required EPA to promulgate regulations specifically implementing the PSD program. See 42 U.S.C. 7471, 7475(a)(2), 7607(d)(1)(J). In Section 7470, Congress specified a unique set of goals for the PSD program in particular, which are not

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[17] The courts of appeals have similarly found that the "identical terms" maxim may be overridden with respect to defined, as with non-defined, terms. In *Comite Pro Rescate De La Salud* v. *Puerto Rico Aqueduct & Sewer Authority*, 888 F.2d 180, 187 (1st Cir. 1989) (Breyer, J.), for example, the court held that EPA may interpret the "various parts" of the statutory definition of "solid waste" in an environmental statute differently for the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq.*, differently for different purposes under the Act, even though Congress mandated that a single definition of "solid waste" apply for all purposes of the statute. See *Connecticut Coastal Fishermen's Ass'n* v. *Remington Arms Co.*, 989 F.2d 1305, 1315 (2d Cir. 1993) (same); *SKF USA, Inc.* v. *U.S.*, 263 F.3d 1369, 1379-1382 (Fed. Cir. 2001) (recognizing agency discretion to interpret single statutory definition of "foreign like product" differently for two purposes, even though the statutory definition applied for both purposes); *Pharmanex* v. *Shalala*, 221 F.3d 1151, 1155-1157 (10th Cir. 2000) (recognizing agency discretion to interpret definition of term "dietary supplement" and its component term "drug" differently in different sections of a single statute); *United States* v. *Pornes-Garcia*, 171 F.3d 142, 144-145, 147 (2d Cir.) (rejecting argument that the incorporation of the definition of "aggravated felony" from 8 U.S.C. 1101(a)(43) into the Sentencing Guidelines mandated identical interpretations of that term in both places), cert. denied, 528 U.S. 880 (1999); *Abbott Labs.* v. *Young*, 920 F.2d 984, 987 (D.C. Cir. 1990) ("it is not impermissible under *Chevron* for an agency to interpret an imprecise term differently in two separate sections of a statute which have different purposes"); *NRDC* v. *EPA*, 822 F.2d 104, 115-117 (D.C. Cir. 1987) (EPA reasonably gave defined term "standard of performance" two different meanings in a single sentence of 33 U.S.C. 1316(d)).

identical to the goals of the Clean Air Act as whole, set forth in Section 7401 of the Act. Among the PSD-specific purposes are "to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate[d] to occur from air pollution * * * notwithstanding attainment and maintenance of all national ambient air quality standards," "to preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historic value," "to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources," and "to assure that any decision to permit increased air pollution * * * is made only after careful evaluation of all the consequences of such a decision." 42 U.S.C. 7470(1), (2), (3), and (5).

By enacting a particularized set of "goals and purposes" for the PSD program, Congress necessarily recognized the corollary principle: that, insofar as those purposes would not, in EPA's judgment, be fulfilled by regulations identical to those promulgated for use in the NSPS program, the PSD regulations may be different from those applicable to NSPS. That principle extends even to regulations defining a common term, such as "increase[] the amount of any air pollutant," that is used in the two programs. While any regulatory definition of "increase" must be consistent with the statutory definition in Section 7411(a)(4), Congress authorized EPA to tailor its regulatory treatment of the constituent terms of that definition, insofar as they are ambiguous, to the "goals and purposes" of each program.[18]

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[18] That is not to say that EPA is *required* to construe "modification" differently for the PSD program than for NSPS purposes. Although at least since 1975 the NSPS regulatory definition of the same statutory term has looked to maximum potential hourly emissions and was left undisturbed when Congress

b. There are other differences between the NSPS and PSD programs that may warrant EPA, in the course of resolving statutory ambiguities, to do so differently with respect to each.[19] The NSPS program was enacted by Congress as part of the Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, and required EPA to develop broadly applicable, uniform, technology-based emissions standards for new or modified sources in specific industrial source categories. 42 U.S.C. 7411. Those standards are based on application of the best demonstrated system of emission reduction for particular industries as a whole, and apply regardless of the actual effect that a source's emissions has on air quality. See *ibid.*; *Potomac Elec. Power Co.* v. *EPA*, 650 F.2d 509, 518 (4th Cir. 1981), cert. denied, 455 U.S. 1016 (1982) . That focus

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extended the NSPS statutory definition to the PSD program in 1977, the D.C. Circuit in *New York* erroneously held that "the CAA unambiguously defines 'increases' in terms of actual emissions" for PSD purposes. 413 F.3d at 39. Congress's use of the same definition of "modification" for both programs demonstrates that EPA would be free to employ the same regulatory approach for both if it concluded that such an approach would best advance the various goals of the Act, and the new rules proposed in 2005 take a step in that direction. See pp. 11-12, *supra*. But nothing in the Act compels the agency to reach that conclusion.

[19] EPA has consistently explained that the distinct purposes and structures of the NSPS and PSD programs can justify different interpretations of "modification." Even before the 1980 PSD regulations, EPA concluded that those distinctions meant that it was not "bound to apply mechanically" the NSPS definition of "modification" for PSD. 43 Fed. Reg. 26,394 (1978). That understanding has continued through promulgation of the regulations at issue here. See 45 Fed. Reg. at 52,713 (rejecting comment urging that PSD should apply to certain pollutants only if NSPS is also applicable, because "the Act requires PSD review, regardless of whether another rule already applies to the source"); 57 Fed. Reg. at 32,316 (explaining divergence between PSD and NSPS regulatory modification tests despite fact that both tests "are based on the broad NSPS definition of 'modification' in section 111(a)(4) of the CAA").

on efficient technology, independent of localized effect, makes a focus on maximum hourly emissions rates reasonable.

The PSD provisions focus on ambient air quality and apply, through a permitting program, to sources that have the potential to adversely impact such air quality. Thus, rather than focus solely on technology-based performance standards, as NSPS does, the PSD program focuses directly on the *effect* of new construction and modification on local air quality, which, in turn, makes a focus on the total amount of resulting emissions in the 1980 and 1992 regulations reasonable. 42 U.S.C. 7470(1), 7475(a)(3), (6), and (7); see *Northern Plains Res. Council* v. *United States EPA*, 645 F.2d 1349, 1356 (9th Cir. 1981), whereas the 1970 NSPS program is "equipment [illegible]nted" and applies regardless of effects on overall air quality, the "site-oriented" PSD program is "focused on where the plant will be located and its potential effect on its environs"); *Potomac Elec. Power*, 650 F.2d at 518 (significant difference between PSD and NSPS is that PSD's purpose "is to preserve existing air quality" while NSPS applies "without regard to the effect the emissions * * * will have on overall air quality").

Congress thus enacted PSD under a separate statutory mandate to regulate sources that might contribute to significant deterioration of local air quality through increased emissions, despite pre-existing CAA provisions, including the technology-focused NSPS. 42 U.S.C. 7470; *WEPCO*, 893 F.2d at 904 (noting that the NSPS program had not been entirely successful); 123 Cong. Rec. 18,022 (1977) (statement by Senator Muskie that "[o]ne purpose of the committee provision to prevent significant deterioration is to try to reverse the current trend in air pollution. * * * The record to date under the new source performance standards approach has been disappointing."). Such differences in the "purposes" and "scope of the legislative power exercised," *Atlantic Cleaners*, 286 U.S.

at 433, indicate that Congress did not mandate a single interpretation of common statutory terms.[20]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[20] Finally, the district court's alternative rationale for rejecting EPA's application of an actual, annual emissions test under the PSD program—that Congress's incorporation of the NSPS statutory definition of "modification" into the PSD provisions also incorporated EPA's then-existing NSPS regulations interpreting "modification" and deprived EPA of discretion to depart from them, see Pet. App. 58a, 62a-67a—is incorrect, and fundamentally at odds with the principle of administrative deference at the core of *Chevron*. Indeed, even the court of appeals rejected the proposition that Congress essentially codified the 1977 NSPS regulations when it added the PSD provisions in 1977. See Pet. App. 15a n.7 (The PSD regulations * * * could even be enforced as the EPA urges"), 18a ("The EPA retains its authority to amend and revise this and other regulations"). The district court's rationale is also inconsistent with this Court's recognition that, even when Congress reenacts a statutory provision that is subject to a long-standing administrative interpretation, the agency retains discretion to adopt other reasonable interpretations of the statute through its rulemaking power. *Helvering* v. *Reynolds*, 313 U.S. 428, 432 (1941).

APPENDIX

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 42 U.S.C. 7411 provides, in pertinent part:

§ 7411. Standards of performance for new stationary sources

(a) Definitions

For purposes of this section:

* * * * *

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

* * * * *

2. 42 U.S.C. 7470 provides:

§ 7470. Congressional declaration of purpose

The purposes of this part are as follows:

(1) to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate[1] to occur from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air),[2] notwithstanding

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[1] So in original. Probably should be "anticipated".

[2] So in original. Section was enacted without an opening parenthesis.

attainment and maintenance of all national ambient air quality standards;

(2) to preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historic value;

(3) to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources;

(4) to assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other State; and

(5) to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.

3. 42 U.S.C. 7475 provides, in pertinent part:

§ 7475. Preconstruction requirements

(a) Major emitting facilities on which construction is commenced

No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless—

(1) a permit has been issued for such proposed facility in accordance with this part setting forth

emission limitations for such facility which conform to the requirements of this part;

(2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

(3) the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter;

(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility;

(5) the provisions of subsection (d) of this section with respect to protection of class I areas have been complied with for such facility;

(6) there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;

(7) the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source; and

(8) in the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under section 7411 of this title has been promulgated subsequent to August 7, 1977, for such source category, the Administrator has approved the determination of best available technology as set forth in the permit.

* * * * *

4. 42 U.S.C. 7479 provides, in pertinent part:

§ 7479. Definitions

For purposes of this part—

(1) The term "major emitting facility" means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred

and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities. Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

* * * * *

(2) * * *

* * * * *

(C) The term "construction" when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility.

(3) The term "best available control technology" means an emission limitation based on the maximum

degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of "best available control technology" result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to November 15, 1990.

* * * * *

5. 42 U.S.C. 7607 provides, in pertinent part:

§ 7607. Administrative proceedings and judicial review

* * * * *

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any de-

termination under section 7521(b)(5)[1] of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title,,[4] under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection

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[1] See References in text note below.

[4] So in original.

shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

* * * * *

(d) Rulemaking

* * * * *

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

* * * * *

(e) Other methods of judicial review not authorized

Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

* * * * *

6. 40 C.F.R. 51.166 (1987) provides, in pertinent part:

§ 51.166. Prevention of significant deterioration of air quality.

* * * * *

(b) *Definitions.* All state plans shall use the following definitions for the purposes of this section. Deviations from the following wording will be approved only if the state specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definitions below:

* * * * *

(2)(i) "Major modification" means any physical change in or change in the method of operation of a major stationary source that would result in a significant

net emissions increase of any pollutant subject to regulation under the Act.

* * * * *

(iii) A physical change or change in the method of operation shall not include:

* * * * *

(*f*) An increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Subpart I or § 51.166.

* * * * *

(3)(i) "Net emissions increase" means the amount by which the sum of the following exceeds zero:

(*a*) Any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and

(*b*) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

* * * * *

(4) "Potential to emit" means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally

enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

* * * * *

(21)(i) "Actual emissions" means the actual rate of emissions of a pollutant from an emissions unit, as determined in accordance with paragraphs (b)(21)(ii) through (iv) of this section.

(ii) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. The reviewing authority may allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(iii) The reviewing authority may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(iv) For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

* * * * *

(23)(i) "Significant" means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate

Carbon monoxide: 100 tons per year (tpy)
Nitrogen oxides: 40 tpy
Sulfur dioxide: 40 tpy
Particulate matter: 25 tpy of particulate matter emissions. 15 tpy of PM_{10} emissions.
Ozone: 40 tpy of volatile organic compounds
Lead: 0.6 tpy
Asbestos: 0.007 tpy
Beryllium: 0.0004 tpy
Mercury: 0.1 tpy
Vinyl chloride: 1 tpy
Fluorides: 3 tpy
Sulfuric acid mist: 7 tpy
Hydrogen sulfide (H_2S): 10 tpy
Total reduced sulfur (including H_2S): 10 tpy
Reduced sulfur compounds (including H_2S): 10 tpy

* * * * *

7. 40 C.F.R. 60.14 (1987) provides, in pertinent part:

§ 60.14. Modification.

(a) Except as provided under paragraphs (e) and (f) of this section, any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies shall be considered a modification within the meaning of section 111 of the Act. Upon modification, an existing facility shall become an affected facility for each pollutant to which a standard applies and for which there is an increase in the emission rate to the atmosphere.

(b) Emission rate shall be expressed as kg/hr of any pollutant discharged into the atmosphere for which a standard is applicable. * * *

* * * * *

(e) The following shall not, by themselves, be considered modifications under this part:

(1) Maintenance, repair, and replacement which the Administrator determines to be routine for a source category, subject to the provisions of paragraph (c) of this section and § 60.15.

(2) An increase in production rate of an existing facility, if that increase can be accomplished without a capital expenditure on that facility.

(3) An increase in the hours of operation.

(4) Use of an alternative fuel or raw material if, prior to the date any standard under this part becomes applicable to that source type, as provided by § 60.1, the existing facility was designed to accommodate that alternative use. A facility shall be considered to be designed to accommodate an alternative fuel or raw material if that use could be accomplished under the facility's construction specifications as amended prior to the change. Conversion to coal required for energy considerations, as specified in section 111(a)(8) of the Act, shall not be considered a modification.

(5) The addition or use of any system or device whose primary function is the reduction of air pollutants, except when an emission control system is removed or is replaced by a system which the Administrator determines to be less environmentally beneficial.

(6) The relocation or change in ownership of an existing facility.

* * * * *

8. 40 C.F.R. 51.166 (1993) provides, in pertinent part:

§ 51.166. Prevention of significant deterioration of air quality.

* * * * *

(b) *Definitions.* All state plans shall use the following definitions for the purposes of this section. Deviations from the following wording will be approved only if the state specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definitions below:

* * * * *

(2)(i) *Major modification* means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.

* * * * *

(iii) A physical change or change in the method of operation shall not include: * * *

* * * * *

(*f*) An increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR subpart I or § 51.166.

* * * * *

(3)(i) *Net emissions increase* means the amount by which the sum of the following exceeds zero:

(*a*) Any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and

(*b*) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

* * * * *

(4) *Potential to emit* means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

* * * * *

(21)(i) *Actual emissions* means the actual rate of emissions of a pollutant from an emissions unit, as determined in accordance with paragraphs (b)(21)(ii) through (iv) of this section.

(ii) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. The reviewing authority may allow the use of a dif-

ferent time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(iii) The reviewing authority may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(iv) For any emissions unit (other than an electric utility steam generating unit specified in paragraph (b)(21)(v) of this section) which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(v) For an electric utility steam generating unit (other than a new unit or the replacement of an existing unit) actual emissions of the unit following the physical or operational change shall equal the representative actual annual emissions of the unit following the physical or operational change, provided the source owner or operator maintains and submits to the reviewing authority, on an annual basis for a period of 5 years from the date the unit resumes regular operation, information demonstrating that the physical or operational change did not result in an emissions increase. A longer period, not to exceed 10 years, may be required by the reviewing authority if it determines such a period to be more representative of normal source post-change operations.

* * * * *

(23)(i) *Significant* means, in reference to a net emissions increase or the potential of a source to emit any of

the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate

Carbon monoxide: 100 tons per year (tpy)
Nitrogen oxides: 40 tpy
Sulfur dioxide: 40 tpy
Particulate matter: 25 tpy of particulate matter emissions. 15 tpy of PM_{10} emissions.
Ozone: 40 tpy of volatile organic compounds
Lead: 0.6 tpy
Asbestos: 0.007 tpy
Beryllium: 0.0004 tpy
Mercury: 0.1 tpy
Vinyl chloride: 1 tpy
Fluorides: 3 tpy
Sulfuric acid mist: 7 tpy
Hydrogen sulfide (H_2S): 10 tpy
Total reduced sulfur (including H_2S): 10 tpy
Reduced sulfur compounds (including H_2S): 10 tpy
Municipal waste combustor organics (measured as total tetra-through octa-chlorinated dibenzo-p-dioxins and dibenzofurans): 3.2×10^{-6} megagrams per year (3.5×10^{-6} tons per year)
Municipal waste combustor metals (measured as articulate matter): 14 megagrams per year (15 tons per year) Municipal waste combustor acid gases (measured as sulfur dioxide and hydrogen chloride): 36 megagrams per year (40 tons per year)

* * * * *

(32) *Representative actual annual emissions* means the average rate, in tons per year, at which the source is projected to emit a pollutant for the two-year

period after a physical change or change in the method of operation of a unit, (or a different consecutive two-year period within 10 years after that change, where the reviewing authority determines that such period is more representative of normal source operations), considering the effect any such change will have on increasing or decreasing the hourly emissions rate and on projected capacity utilization. In projecting future emissions the reviewing authority shall:

(i) Consider all relevant information, including but not limited to, historical operational data, the company's own representations, filings with the State or Federal regulatory authorities, and compliance plans under title IV of the Clean Air Act; and

(ii) Exclude, in calculating any increase in emissions that results from the particular physical change or change in the method of operation at an electric utility steam generating unit, that portion of the unit's emissions following the change that could have been accommodated during the representative baseline period and is attributable to an increase in projected capacity utilization at the unit that is unrelated to the particular change, including any increased utilization due to the rate of electricity demand growth for the utility system as a whole.

* * * * *

9. 40 C.F.R. 60.14 (1993) provides, in pertinent part:

§ 60.14. Modification.

(a) Except as provided under paragraphs (e) and (f) of this section, any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies shall be considered a modifi-

cation within the meaning of section 111 of the Act. Upon modification, an existing facility shall become an affected facility for each pollutant to which a standard applies and for which there is an increase in the emission rate to the atmosphere.

(b) Emission rate shall be expressed as kg/hr of any pollutant discharged into the atmosphere for which a standard is applicable. * * *

* * * * *

(e) The following shall not, by themselves, be considered modifications under this part:

(1) Maintenance, repair, and replacement which the Administrator determines to be routine for a source category, subject to the provisions of paragraph (c) of this section and § 60.15.

(2) An increase in production rate of an existing facility, if that increase can be accomplished without a capital expenditure on that facility.

(3) An increase in the hours of operation.

(4) Use of an alternative fuel or raw material if, prior to the date any standard under this part becomes applicable to that source type, as provided by § 60.1, the existing facility was designed to accommodate that alternative use. A facility shall be considered to be designed to accommodate an alternative fuel or raw material if that use could be accomplished under the facility's construction specifications as amended prior to the change. Conversion to coal required for energy considerations, as specified in section 111(a)(8) of the Act, shall not be considered a modification.

(5) The addition or use of any system or device whose primary function is the reduction of air pollutants, except when an emission control system is removed or is replaced by a system which the Administrator determines to be less environmentally beneficial.

(6) The relocation or change in ownership of an existing facility.

* * * * *

(h) No physical change, or change in the method of operation, at an existing electric utility steam generating unit shall be treated as a modification for the purposes of this section provided that such change does not increase the maximum hourly emissions of any pollutant regulated under this section above the maximum hourly emissions achievable at that unit during the 5 years prior to the change.

* * * * *

10. 40 C.F.R. 52.21 (2003) provides, in pertinent part:

§ 52.21. Prevention of significant deterioration of air quality.

(a)(1) *Plan disapproval.* The provisions of this section are applicable to any State implementation plan which has been disapproved with respect to prevention of significant deterioration of air quality in any portion of any State where the existing air quality is better than the national ambient air quality standards. Specific disapprovals are listed where applicable, in subparts B through DDD of this part. The provisions of this section have been incorporated by reference into the applicable implementation plans for various States, as provided in subparts B through DDD of this part.

Where this section is so incorporated, the provisions shall also be applicable to all lands owned by the Federal Government and Indian Reservations located in such State. No disapproval with respect to a State's failure to prevent significant deterioration of air quality shall invalidate or otherwise affect the obligations of States, emission sources, or other persons with respect to all portions of plans approved or promulgated under this part.

(2) *Applicability procedures.* (i) The requirements of this section apply to the construction of any new major stationary source (as defined in paragraph (b)(1) of this section) or any project at an existing major stationary source in an area designated as attainment or unclassifiable under sections 107(d)(1)(A)(ii) or (iii) of the Act.

(ii) The requirements of paragraphs (j) through (r) of this section apply to the construction of any new major stationary source or the major modification of any existing major stationary source, except as this section otherwise provides.

(iii) No new major stationary source or major modification to which the requirements of paragraphs (j) through (r)(5) of this section apply shall begin actual construction without a permit that states that the major stationary source or major modification will meet those requirements. The Administrator has authority to issue any such permit.

(iv) The requirements of the program will be applied in accordance with the principles set out in paragraphs (a)(2)(iv)(a) through (f) of this section.

(*a*) Except as otherwise provided in paragraphs (a)(2)(v) and (vi) of this section, and consistent with the

definition of major modification contained in paragraph (b)(2) of this section, a project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases—a significant emissions increase (as defined in paragraph (b)(40) of this section), and a significant net emissions increase (as defined in paragraphs (b)(3) and (b)(23) of this section). The project is not a major modification if it does not cause a significant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase.

(*b*) The procedure for calculating (before beginning actual construction) whether a significant emissions increase (i.e., the first step of the process) will occur depends upon the type of emissions units being modified, according to paragraphs (a)(2)(iv)(*c*) through (*f*) of this section. The procedure for calculating (before beginning actual construction) whether a significant net emissions increase will occur at the major stationary source (*i.e.*, the second step of the process) is contained in the definition in paragraph (b)(3) of this section. Regardless of any such preconstruction projections, a major modification results if the project causes a significant emissions increase and a significant net emissions increase.

(*c*) *Actual-to-projected-actual applicability test for projects that only involve existing emissions units.* A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the projected actual emissions (as defined in paragraph (b)(41) of this section) and the baseline actual emissions (as defined in paragraphs (b)(48)(i) and (ii) of this section), for each existing emissions unit, equals or

exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(*d*) *Actual-to-potential test for projects that only involve construction of a new emissions unit(s).* A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the potential to emit (as defined in paragraph (b)(4) of this section) from each new emissions unit following completion of the project and the baseline actual emissions (as defined in paragraph (b)(48)(iii) of this section) of these units before the project equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(*e*) *Emission test for projects that involve Clean Units.* For a project that will be constructed and operated at a Clean Unit without causing the emissions unit to lose its Clean Unit designation, no emissions increase is deemed to occur.

(*f*) *Hybrid test for projects that involve multiple types of emissions units.* A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the emissions increases for each emissions unit, using the method specified in paragraphs (a)(2)(iv)(*c*) through (*e*) of this section as applicable with respect to each emissions unit, for each type of emissions unit equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section). For example, if a project involves both an existing emissions unit and a Clean Unit, the projected increase is determined by summing the values determined using the method specified in paragraph (a)(2)(iv)(*c*) of this section for the existing unit and using the method specified in paragraph (a)(2)(iv)(*e*) of this section for the Clean Unit.

* * * * *

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Supreme Court of the United States

ENVIRONMENTAL DEFENSE, *et al.*,

Petitioners,

v.

DUKE ENERGY CORPORATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTIONS PRESENTED

1. Whether the Clean Air Act's provision for expedited judicial review of "final action" promulgated by EPA, 42 U.S.C. § 7607(b), stripped the courts below of authority to consider a new interpretation of EPA's 1980 New Source Review rules that was developed and imposed in an enforcement action initiated in 1999; and

2. Whether EPA unlawfully interpreted its New Source Review rules to convert existing electric generating plants into "new sources," even though those plants had not undergone "modifications" as that term has been defined and used for decades under those rules and under the Act.

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123 Cong. Rec. 18,021 (1977) 46
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OTHER AUTHORITIES

E.P.A., *Basic Facts On CAIR*, *at* http://www.epa.gov/cair/basic.html (last visited Aug. 6, 2006) 47
E.P.A., *Fact Sheet - Final Amendments to the Regional Haze Rule and Guidelines for Best Available Retrofit Techonology (BART) Determinations, 2005*, *available at* http://www.epa.gov/visibility/fs_2005_6_15.html (last visited Aug. 6, 2006) 47
E.P.A., New Source Review (NSR), Policy & Guidance, *at* http://www.epa.gov/nsr/guidance.html 28

INTRODUCTION

The issue in this enforcement action is: When is an existing power plant transformed into a "new source" under the Clean Air Act ("CAA") and its implementing rules, requiring the plant to obtain a pre-construction permit and install "new source" emissions controls? Under the CAA and its rules, an existing source becomes a "new source" only when it undergoes a "modification." In 1977, Congress defined "modification" under New Source Review ("NSR") to be the same as the definition of "modification" under the pre-existing New Source Performance Standards ("NSPS"). See 42 U.S.C. § 7479(2)(C) ("The term 'construction' when used in connection with any source or facility, includes the modification (*as defined in section 7411(a) of this title*) of any source or facility.") (emphasis added). The Environmental Protection Agency ("EPA") promulgated its NSR rules in 1980 (the "1980 Rules") and originally interpreted them to mean exactly that. And the electric utility industry followed those rules for two decades. Nonetheless, in this enforcement action EPA retroactively announced a new and conflicting approach—suddenly contending that the entire industry had blatantly violated the rules for years.

EPA's enforcement approach is out of step with history and the basic statutory and regulatory framework. Congress used the term "modification" in all of the "new source" programs for good reason. Like NSPS, NSR requires new sources of pollution to engage in pre-construction review and install state-of-the-art pollution controls—a massive undertaking that EPA acknowledges would be "very costly and can present significant technical challenges" for existing facilities. 70 Fed. Reg. 61,081, 61,093 (Oct. 20, 2005). To ensure that NSR is triggered only when compliance with its requirements makes economic and practical sense and fits within the statutory scheme, Congress applied NSR only to "construction," which includes the building of new facilities and the "modification" of existing facilities. 42 U.S.C. § 7479(2)(C).

The term "modification" had a well-established meaning when the 1977 Amendments were enacted. And EPA carried that precise meaning forward in its rules. Under both NSPS and NSR, a project is a "modification" only if it causes an increase in a unit's basic emissions capacity (measured by its hourly emissions rate), effectively creating a "new," larger source of emissions. 40 C.F.R. §§ 51.100, 52.01(d), 60.14, & 60.2.[1] NSR then imposes more stringent requirements on certain "modifications," known as "major modifications." *Id.* §§ 51.166, 52.21. A "major modification" occurs if the project significantly increases total annual emissions at the overall source, calculated using representative hours of operation. *Id.* § 51.166(b)(2)-(3), (21).

In 1999, however, EPA launched its "unprecedented" NSR enforcement initiative, including this lawsuit against Duke Energy Corporation ("Duke"). See Press Release, U.S. D.O.J., *U.S. Sues Electric Utilities in Unprecedented Action to Enforce the Clean Air Act* (Nov. 3, 1999) (Duke Mot. Summ. J. Ex. 7). In this enforcement initiative, EPA attempted through litigation to force the electric utility industry to retrofit new-source controls on all coal-fired power plants—at a cost of billions of dollars and under the threat of billions more in civil penalties. To obtain this result, EPA reinterpreted the NSR rules to eliminate the well-established "modification" trigger. Instead, EPA contended that NSR could be triggered by commonplace projects that merely maintain a facility's operating capabilities and do not increase the facility's emissions rate.

This case involves 29 such projects, which Duke undertook as long ago as 1988 at eight different power plants in North and South Carolina. Contrary to the impression Petitioners attempt to foster, these plants are by no means unregulated, because "NSR is not the primary mechanism for reducing emissions from existing sources." *New York* v. *EPA*, 413 F.3d 3, 28 (D.C. Cir. 2005) ("*New York I*"). Other CAA re-

[1] Unless otherwise noted, all C.F.R. citations are to the 1987 edition.

quirements and state clean air laws set strict limits on the emissions of sulfur dioxide (SO_2), nitrogen oxides (NO_x) and particulate matter from each of these plants. For example, Duke's plants are subject to health-based emission limits set forth in their state operating permits. JA165. In addition, the plants are regulated under (1) the CAA's "Acid Rain" program, which requires existing plants to reduce their SO_2 and NO_x emissions; (2) the "NO_x SIP Call" and the "Clean Air Interstate Rule," which require utilities in the eastern States to achieve additional reductions in SO_2 and NO_x; and (3) North Carolina's Clean Smokestacks legislation, one of the nation's most stringent air emission control laws. JA166-67.

The projects EPA deemed to violate NSR involved the replacement and repair of corroded boiler components—principally steel tubes that carry water or steam. JA159-61. None of the projects violated any condition of Duke's operating permits. JA161. None increased any unit's capacity to emit pollutants. *Id.* Moreover, these projects were performed in full view and with the knowledge of EPA and the state authorities charged with enforcing the Act; but neither ever hinted that Duke's maintenance activities required "new source" permits. Nor, before the 1999 enforcement initiative, did any private party challenge any of these projects in any citizen suit. No one suggested that Duke's activities required NSR permits for a simple reason: EPA, the States, and the industry all understood and interpreted the rules to apply to existing emissions units only when those units underwent NSPS "modifications"—fundamentally changing the units' ability to emit pollutants.

EPA's enforcement position is particularly odd in light of the Agency's concession in a recent notice-and-comment rulemaking that its position "leads to outcomes that have not advanced the central policy of the major NSR program." 70 Fed. Reg. at 61,088. In that rulemaking, initiated in late 2005, EPA proposed a rule consistent with Duke's position here and the decisions below. *Id.* at 61,081. Even before that

proposal, EPA effectively had ended its enforcement initiative, stating that it would bring no new cases under its pre-2002 rules. See *United States* v. *Alabama Power Co.*, 372 F. Supp. 2d 1283, 1306 n.44 (N.D. Ala. 2005).[2]

In the end, Petitioners' and the United States' arguments do not withstand common-sense scrutiny. Under their view, the electric utility industry has engaged in decades-long, universal noncompliance—in plain view of and in complicity with state and federal regulators. The far more sensible conclusion is that EPA changed its interpretation of the statute and rules in this enforcement initiative—adopting an interpretation it now has disavowed as bad policy. Thus, this case is based on a made-for-litigation theory that is inconsistent with the language and history of the rules, EPA's historical interpretation of those rules, and EPA's current policy position. The Court should reject this litigation-based approach to regulation and affirm the judgment below.

STATEMENT OF THE CASE

I. REGULATORY BACKGROUND.

A. Existing Source Programs.

The 1970 Amendments established the basic framework of federal air pollution regulation. These Amendments directed EPA to develop National Ambient Air Quality Standards ("NAAQS"), which establish allowable ambient pollution levels to protect public health and welfare with an adequate margin of safety. See 42 U.S.C. § 7409; *Alaska Dep't Envtl. Conserv.* v. *EPA*, 540 U.S. 461, 469 (2004) ("*ADEC*").

"The provisions for the attainment and maintenance of NAAQS were to operate primarily through controls on existing sources of pollution," established in implementation plans developed and enforced by the States. *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 346 (D.C. Cir. 1979). These State Im-

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[2] Consistent with that position, the United States urged this Court to deny the petition for certiorari and allow EPA's policymaking process to continue. *See* U.S. Opp'n Pet. Cert. at 8-9.

plementation Plans ("SIPs") establish source-by-source emissions limits, see 42 U.S.C. § 7410; *Train* v. *NRDC*, 421 U.S. 60, 66-67 (1975), which are based on the assumption that existing sources "operate 24 hours a day at full capacity"—"every day of the year." *Cleveland Elec. Illuminating Co.* v. *EPA*, 572 F.2d 1150, 1160 (6th Cir. 1978).

B. "New Source" Programs.

1. The NSPS Program Applies to Newly Constructed and "Modified" Emissions Sources.

To assist States in meeting their ambient air quality standards, the 1970 Amendments directed EPA to issue NSPS, which are technology-based standards that regulate emissions from "new sources." 42 U.S.C. § 7411(b). In general, these controls are "more stringent than those needed to meet [the] NAAQS." *Alabama Power Co.*, 636 F.2d at 346. The Amendments also required pre-construction review of all "new sources" subject to NSPS. See 42 U.S.C. § 7410(a)(2)(D), (a)(4) (1971).

Congress chose not to apply NSPS to *existing* sources as a general matter, however, because of the high cost and difficulty of installing new control technology on such sources. See, *e.g.*, S. Rep. No. 91-1196, at 15-17 (1970). Instead, NSPS applied only to "new sources"—defined as newly-constructed units and "modification[s]" to existing units. 42 U.S.C. § 7411(a)(2). Thus, NSPS applies to existing sources only where a "modification" occurs—defined as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." *Id.* § 7411(a)(4).

For more than 30 years, "modifications" have included only activities that in essence create a "new source" by increasing a unit's actual emissions capabilities—as measured by the unit's hourly emissions rate, not by variations in hours of operation. The definition of "modification" promulgated in 1971 tracked the statutory definition almost verbatim. See 40

C.F.R. § 60.2(h) (1972). In addition, the rules specified that "increase[s] in hours of operation" and "increase[s] in the production rate ... [within a facility's] operating design capacity" are not modifications. 36 Fed. Reg. 24,876, 24,877 (Dec. 23, 1971). Thus, for existing units, an increase in the "amount" of emissions always has meant an increase in the unit's basic capacity to emit pollutants, resulting in a "new," larger emissions unit.

In 1975, EPA clarified that the phrase "increases the amount of any air pollutant" in the definition of "modification" means an increase "in the emission rate," measured "as kg/hr." 40 C.F.R. § 60.14(a)-(b); 40 Fed. Reg. 58,416, 58,416 (Dec. 16, 1975). This hourly rate assures that the rule "automatically allow[s] increases in operating hours as intended by [the operating hours exclusion in] 40 C.F.R. 60.2(h)." 39 Fed. Reg. 36,946, 36,947 (Oct. 15, 1974). In promulgating this rule, EPA "did not create a new definition of modification," but rather "define[d] how to determine an actual emissions increase." 70 Fed. Reg. at 61,096.

2. The Statutory PSD Program Did Not Change the Definition of "Modification."

a. *NSPS "Modification" Was the Trigger for Pre-construction Permitting in the Pre-1977 Regulatory NSR Programs.*

Before Congress enacted the NSR provisions at issue here—the "Prevention of Significant Deterioration" ("PSD") provisions—EPA had promulgated a regulatory PSD program. See *Alabama Power*, 636 F.2d at 346-49. These PSD rules regulated the "construction" of new sources and the "modification" of existing sources—defining those terms essentially the same as the existing NSPS rules 40 C.F.R. § 52.01(d) (1975). EPA also stated that the "general definition of modified source" in regulatory PSD was meant to be "consistent with the definition used in Part 60"—the NSPS program. 39 Fed. Reg. 42,510, 42,513 (Dec. 5, 1974).

EPA introduced the term "major modification" in a 1976 interpretive ruling. See 41 Fed. Reg. 55,524 (Dec. 21, 1976). This ruling imposed additional requirements on certain NSPS "modifications" in so-called "nonattainment" areas. These requirements applied only to those "modifications" that were "major" (or would have a greater air quality impact)—defined as "modifications" that increased annual emissions over a particular tons-per-year level. *Id.* at 55,528.

b. *Congress Enacted the NSPS "Modification" Concept into Statutory PSD.*

In 1977, Congress enacted the statutory PSD program. "The PSD requirements ... 'are designed to ensure that the air quality in attainment areas or areas that are already 'clean' will not degrade.'" *ADEC*, 540 U.S. at 470.

In enacting the 1977 Amendments, Congress codified many elements of the existing new source rules and "tightened" others. *Alabama Power*, 636 F.2d at 349-50; see also 45 Fed. Reg. 52,676, 52,679 (Aug. 7, 1980). The statutory PSD program expanded upon the pre-existing NSPS and regulatory PSD programs by extending "new source" coverage to additional source categories and pollutants. See *Alabama Power*, 636 F.2d at 350-51. Congress also tightened the regulatory PSD definition of Best Available Control Technology ("BACT"), to require control technology at least as stringent as the technology required under NSPS. See *ADEC*, 540 U.S. at 472-73; 42 U.S.C. § 7475(a)(4). And Congress imposed rigorous new permitting requirements—including extensive air quality modeling, a public hearing, and a public comment period. 42 U.S.C § 7475(a). "[A]n applicant sometimes must spend up to $500,000 on [this] permit process and ... for a complex project, the time for approval can take from five to seven years." *ADEC*, 540 U.S. at 516-17 (Kennedy, J. dissenting).

Because this pre-construction process cannot sensibly apply to ordinary maintenance projects at existing sources, Congress did *not* require EPA to change its definition of "modifi-

cation." Instead, Congress expressly incorporated the existing definition of "modification" into PSD. See 42 U.S.C. § 7479(2)(C).

In fact, as enacted the PSD provisions referred only to "construction"; they did not include the term "modification" at all. Three months after their enactment, Congress clarified in a "technical and conforming amendment" that the "construction" activity subject to PSD includes "modifications" as defined under NSPS. See 123 Cong. Rec. 36,250, 36,331 (Nov. 1, 1977) (capitalization omitted). It was "not the purpose of these amendments to re-open substantive issues in the [CAA]." *Id.* at 36,252. Instead, the amendments "defin[ed] 'construction' in [PSD] to conform to usage in other parts of the Act." *Id.* at 36,331. EPA has repeatedly acknowledged that this reference to "'usage in other parts of the Act' ... refers, not only to section 111(a)(4), but also to the EPA regulations implementing section 111 that were in effect at the time." 49 Fed. Reg. 43,211, 43,213 (Oct. 26, 1984); see also 43 Fed. Reg. 26,380, 26,394 (Jun. 19, 1978); 68 Fed. Reg. 61,248, 61,269 (Oct. 27, 2003).

3. EPA's Post-1977 PSD Rules Required An NSPS "Modification" As The Trigger For A "Major Modification" Analysis.

a. *The 1978 Rules.*

In 1978, EPA promulgated its first rules implementing the 1977 Amendments. See 43 Fed. Reg. 26,380 (June 19, 1978). Consistent with the Act, EPA applied PSD to the "'construction'" of new sources—which includes "modification[s]" to existing sources. *Id.* at 26,383. EPA did not create a new definition of "modification," however. Instead, consistent with PSD's focus on "'major emitting facilit[ies],'" 42 U.S.C. § 7479(1), the 1978 rules imposed PSD requirements only on a subset of NSPS "modifications": those that are "major." 43 Fed. Reg. at 26,382; see also *id.* at 26,385 (stating that SIPs "may provide that [such] requirements shall apply to a proposed source or modification only with respect to those pol-

lutants for which the proposed construction would be a major source or major modification"). EPA adopted the "major modification" standard to avoid imposing more stringent PSD requirements on NSPS "modifications" that, because of their size or other factors, would not cause significant changes in ambient air quality.

The 1978 rules defined "major modification" to require an increase in a unit's "potential" annual emissions rate—assuming that the unit operates 24 hours per day, 365 days per year before and after the project—by more than either 100 or 250 tons per year, depending on the type of source. See *Alabama Power*, 636 F.2d at 399. Because emissions thus were measured using constant pre- and post-project "potential" hours of operation, only NSPS "modifications" (activity that increased a unit's hourly emission rate, without regard to hours of operation) that was large enough to cause a "major" increase in annual emissions would trigger PSD.

Nearly all of the 1978 rules were challenged. However, no one challenged the requirement that an NSPS "modification" occur before a PSD "major modification" could occur. And, although the D.C. Circuit agreed that the PSD program should not "delay and impede industrial changes that Congress did not intend to regulate," the court rejected the 100/250 tpy threshold for "major modifications." *Id.* at 399-404. Instead, the court suggested other mechanisms—specifically, a source-wide emissions "netting" provision and a "*de minimis*" exception—to avoid applying PSD to "modifications" that would not significantly affect air quality. *Id.*

b. *The 1980 Rules.*

In 1979, EPA proposed revisions in response to *Alabama Power*. EPA left unchanged the definition of "modification" for individual units, but proposed that "major modifications" require "a significant net increase in [a source's] potential to emit." 44 Fed. Reg. 51,924, 51,952 (Sept. 5, 1979). This change replaced the 100/250 ton-per-year threshold with a lower "significance" test and a source-wide "netting" calcula-

tion. The "netting" provision limited "major modifications" to those "modifications" that would cause a source-wide "net emissions increase"—calculated using contemporaneous emissions increases and decreases at all units at the source (also known as the "bubble approach").

EPA issued its final PSD rules in 1980.[3] The 1980 Rules maintained the condition that a "modification" occur at a unit before a source-wide "major modification" analysis is required. See 40 C.F.R. §§ 51.100, 52.01(d). But the rules revised the method of determining whether a "modification ... qualifies as major." 45 Fed. Reg. at 52,677. Under the 1980 Rules, a "major modification" occurs only if a significant net increase in the source's "actual" emissions occurs. See 40 C.F.R. § 51.166(b)(2)(i), (3)(i), (21). The rules required "actual emissions" to be calculated using constant operating hours from a "representative" period before the change. See *id.* § 51.166(b)(21)(ii); *Wisconsin Elec. Power Co.* v. *Reilly*, 893 F.2d 901, 918 n.14 (7th Cir. 1990) ("*WEPCo*").

In the preamble, EPA explained that it "shifted the focus of its regulatory definitions from 'potential to emit' to 'actual emissions'" to address a "'paper offset'" problem associated with the netting of hypothetical ("potential") emissions. 45 Fed. Reg. at 52,700. This change in netting methodology neither repealed the requirement that only NSPS "modifications" trigger a "major modification" analysis, nor dramatically expanded the activities subject to PSD review. To the contrary, the rules specifically provided that the terms "physical [or operational] change" do not include an "increase in the hours

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[3] The PSD rules applicable here are those adopted in the North Carolina and South Carolina SIPs and approved by EPA. See 47 Fed. Reg. 7836 (Feb. 23, 1982); 40 C.F.R. § 52.1770 (North Carolina); 47 Fed. Reg. 6017 (Feb. 10, 1982); 40 C.F.R. § 52.2120 (South Carolina). These provisions follow the federal 1980 PSD rules, originally promulgated at 40 C.F.R. §§ 51.24 (rules for SIPs—recodified at 40 C.F.R. § 51.166 in 1987), and 52.21 (federal rules). These rules "are essentially identical, with the difference in reviewing agency, EPA as opposed to State, being the major distinction." 43 Fed. Reg. at 26,380.

of operation," 40 C.F.R. § 51.166(b)(2)(iii)(f), confirming that only new emissions capacity is treated as an emissions increase. In its economic impact analysis, EPA explained that the final rules' coverage was similar to that of the 1978 rules and the 1979 proposal. 45 Fed. Reg. at 52,729.

c. *The CMA Rule Challenge.*

Various parties challenged the 1980 Rules. Once again, no one challenged the rules' requirement that a "modification" occur before a "major modification" analysis is required. And, of course, no one contended that a "modification" *had* to occur for a "major modification" analysis to occur, because that was exactly what the 1980 Rules provided. The sole challenge to the "major modification" requirement was by General Motors ("GM") on the ground that the source-wide "netting" calculation used "actual" rather than "potential" emissions—a ground not joined by most industry petitioners. See Br. Industry Pets. on Actual Emissions Definition of Net Increase at 5, *Chemical Mfrs. Ass'n* v. *EPA*, No. 79-1112 (D.C. Cir. Feb. 12, 1981) ("This case seeks review of the manner in which EPA has chosen to implement the bubble approach ...."); *id.* at 25 (contending "no modification occurs" if source-wide "potential emissions" do not increase). Thus, the GM challenge to the "major modification" netting test had nothing to do with Duke's position here. The various challenges ultimately resulted in the "*CMA* settlement," and the case was administratively closed.

4. Implementation Of The PSD Program.

a. *EPA's Contemporaneous Interpretation of "Major Modification" Required a Threshold "Modification."*

Shortly after finalizing the 1980 Rules, EPA confirmed in two applicability determinations that only a "modification" as defined under NSPS triggers a PSD "major modification" analysis. In 1981, EPA explained that "PSD applicability is determined by evaluating any change in emissions rates caused by" the physical or operational change under review.

JA28 ("GE Determination"). Absent a change in the hourly emission rate, EPA concluded, actual emissions "could increase only if there is an increase in the production rate or hours of operation, both of which are specifically exempt from PSD review." *Id.* In a second determination, EPA stated that an increase in a unit's hours of operation enabled by a physical change did not trigger PSD. See JA35-37 ("Cargill Determination"). Thus, under EPA's contemporaneous interpretation of the 1980 Rules, a physical change that only increases an existing unit's hours of operation is not a "modification" and cannot be a "major modification."

b. *Early Circuit Decisions Confirmed that an NSPS "Modification" Is a Precondition to PSD Applicability.*

Throughout the 1980s, the electric utility industry continued to engage in and improve its maintenance and repair practices, to ensure that its generating units could be counted upon to operate reliably. Of course, maintaining an existing unit at its existing emissions rate does not trigger NSPS or PSD. Nor—contrary to Petitioners' apparent position, see Pet. Br. 6-7—does the CAA or any other statute require utilities to retire their units after a certain number of years of operation. Indeed, electric utilities are *required* to maintain and repair their units to meet their statutory duty to provide an efficient and reliable supply of electricity for the public. See, *e.g.*, N.C. Gen. Stat. § 62-2; S.C. Code Ann. § 58-27-1510; S.C. Code Ann. Regs. 103-360.

Before 1999, EPA's only attempt to apply PSD to a project at an existing electric utility involved a "highly unusual, if not unprecedented" "renovation" of five units at the Wisconsin Electric Power Company's ("WEPCo") Port Washington Plant, which had operated well below capacity for over 10 years. See JA249-50 (Clay Mem.). EPA determined that an NSPS "modification" would occur at three of the units—because the projects would increase the units' maximum achievable hourly emissions rates. EPA also determined that

a PSD "major modification" would occur at all five units. To reach that result, EPA applied a new and unusual interpretation of its 1980 Rules to the units that were not NSPS "modifications." Specifically, EPA claimed that a "'major modification'" could occur if a unit's post-project "'potential to emit'" would exceed its "actual emissions" before the project—the so-called "actual-to-potential" test. JA255-56.

WEPCo petitioned for review, and the Seventh Circuit reversed EPA's PSD determination on the merits. Noting that the 1980 Rules on their face apply the "potential to emit" concept only to a "unit which has not begun normal operations" 40 C.F.R. § 51.166(b)(21)(iv), the court described EPA's interpretation as "assum[ing] what it seeks to prove"—because, "in order to demonstrate that [WEPCo's] like-kind replacement project constitutes a modification, ... EPA *assumes* that the plant is a 'modified' unit." *WEPCo*, 893 F.2d at 917 (emphasis added). On remand, the court ordered EPA to determine "whether the renovated plant would cause a significant net emissions increase if it were operated under present hours and conditions"—assuming constant, representative annual operating hours and conditions. *Id.* at 918 n.14. "The practical effect [of the 'present hours and conditions' requirement] is that a net emissions increase can result only from an increase in the hourly rate of emissions," *Alabama Power*, 372 F. Supp. 2d at 1308—in other words, only if an NSPS "modification" first occurs. EPA and WEPCo ultimately settled.

In *Puerto Rican Cement Co.* v. *EPA*, the First Circuit upheld the application of PSD to a proposal "to build a new cement kiln, replacing older kilns" at a source. 889 F.2d 292, 293 (1st Cir. 1989) (Breyer, J.). The court found no anomaly in applying PSD to the installation of a "new" unit even though the company could have "increase[d] production at its old kilns to 100 percent of capacity, thereby vastly increasing actual emissions" without triggering PSD. *Id.* at 298. According to the court, the reason for this distinction "lies in the

statute itself, for the statute refers to the '*construction*' of facilities, not to *increased use of existing facilities*." *Id.*

Thus, both *WEPCo* and *Puerto Rican Cement* held that PSD may be triggered when there is NSPS "construction" activity—NSPS "modifications" of three existing units in *WEPCo*, and the installation of a brand new unit in *Puerto Rican Cement*. Neither court held that a project that was not a "modification" at all could be a "major modification."

c. *In 1992 EPA Promulgated the Optional "WEPCo Rule."*

In 1992, EPA promulgated a new rule known as the "WEPCo Rule." 57 Fed. Reg. 32,314 (July 21, 1992). This rule did not change the 1980 Rules governing the method for calculating emissions increases. Instead, the 1992 WEPCo Rule created an *optional* test for electric utilities, and the 1980 Rules remained the default. See Pet. App. 71a n.25. Under this test, utilities could compare pre-project "actual" emissions to post-project "projected actual" emissions. 40 C.F.R. § 51.166(b)(21)(v) (1993). However, this test is available *only* to utilities that satisfy certain post-project reporting requirements, see *id.*—which Duke did not do.[4]

5. The 1990 Amendments And EPA's Post-*WEPCo* Pronouncements Confirm The Established Definition Of "Modification."

The *WEPCo* case arose when EPA, Congress, industry, and environmental organizations were concerned that SO_2 emissions from coal-fired plants were causing acid rain. See, *e.g.*, S. Rep. No. 101-228, at 261-301 (1989). Addressing poten-

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[4] After successfully arguing that the 1992 Rules were irrelevant to the district court's analysis—because they are "optional"—the United States now appears to argue for their application here. U.S. Br. 20 & n.4. The United States' new position not only is wrong, it is improper. *See Zedner v. United States*, 126 S. Ct. 1976, 1987 (2006); *see also In re Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990) (barring party from changing position with respect to a "subsidiary question" on which he prevailed in prior proceedings, "[e]ven though [he] did not prevail on the appeal as a whole").

tial solutions to that problem, EPA's Assistant Administrator for Air stated at an "Acid Rain Conference" that the CAA's new source provisions had only limited applicability to existing coal-fired power plants. See JA84-88. He further explained that the Act's definition of "modification" did not cover "activities at a plant which tend to extend the useful life of that plant or tend to increase the total emissions generated over the total life of that plant." JA87.

Similarly, in 1987, EPA's Administrator testified that the new source programs did not require retrofitting new source controls on existing coal-fired power plants and that EPA opposed any legislation that would mandate such unit-by-unit controls. See JA89-95 (statement of Lee Thomas). According to the Administrator, "[t]here is nothing that EPA can do to prevent a powerplant which had previously been emitting at a level well below its SIP limit from increasing its emissions, as long as it remains below its legally sanctioned ceiling." JA14.

Congress ultimately enacted legislation to reduce SO_2 and NO_x emissions in the 1990 CAA Amendments, known as Title IV or the Acid Rain Program. During the Title IV debates, EPA provided analyses stating that existing coal-fired boilers would operate for an average of 55-65 years and that refurbishments would be undertaken without triggering PSD. See JA121-22; JA126-29; see also JA100-04. Several proposals would have required such boilers to retrofit new source control technologies—the precise result Petitioners and the United States seek here.[5] Congress rejected those proposals and enacted instead a national emissions "cap" and a "trading" regime that allows utilities to meet that cap through a variety of means, including installing pollution controls at

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[5] *See* S. 300, 100th Cong. § 2(a) (1987); S. 2203, 99th Cong. § 2(a) (1986); *see also* S. 316, 100th Cong. §§ 183(b)(1), (c)(1), 187 (1987); S. 321, 100th Cong. § 182(a) (1987); S. 2813, 99th Cong. §§ 183(b)(1), (c)(1), 187 (1986); S. 2200, 99th Cong. §§ 182(a), 184 (1986); H.R. 4567, 99th Cong. §§ 182(b), 184(f) (1986); S. 52, 99th Cong. § 183(e) (1985).

particular units, fuel switching, emissions trading, and other measures. See 42 U.S.C. §§ 7651-7651o; H.R. Rep. No. 101-490, pt. 1, at 365 (1990); *Clean Air Reauthorization (Pt. 2): Hearings before the Subcomm. on Energy & Power of the H. Comm. on Energy & Commerce*, 101st Cong. 234-36 (1989) (statement of W.G. Rosenberg, Assistant Adm'r, Air and Radiation, EPA).

Before and after the 1990 Amendments, EPA repeatedly stated that its WEPCo determination did not reflect any attempt to expand PSD. See Pet. App. 50a-53a. Thus, in response to a Government Accounting Office ("GAO") inquiry, EPA stated it did "not consider WEPCO's project typical of most utility life extension projects, and [it] expect[s] that the ruling will not significantly affect utilities' decisions to undertake power plant life extension projects." JA137; see JA155 (stating most power plant repair projects would not trigger PSD).[6] Indeed, if most power plant repair or replacement projects triggered PSD, then every power plant would have to install BACT, and the more flexible, market-based trading approach of Title IV would serve no purpose.

II. EPA CHANGED ITS INTERPRETATION IN THE 1999 "ENFORCEMENT INITIATIVE."

A. EPA's Enforcement Position.

In an abrupt reversal of position, EPA launched the "enforcement initiative" in November 1999. EPA filed lawsuits against numerous utility companies claiming that 549 maintenance, repair and replacement projects at 148 generating units located at 56 existing coal-fired power plants had violated NSR. See Duke C.A. App. 493-511. In this case, EPA al-

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[6] EPA knew of utility repair practices prevalent at the time—including several of Duke's projects here. *See* Letter from Reilly, EPA, to Rep. Dingell (Apr. 19, 1989), (Duke Mot. Summ. J. Ex. 45) (responding to question regarding Duke PMP project at Dan River Station); JA176-82 (Farmer Mem.) (identifying Duke PMP projects at Dan River, Allen, Riverbend, Cliffside and Buck Stations). *See also* Pet. App. 50a n.13 (describing EPA's knowledge of utility "life extension" projects).

leged violations at virtually all of Duke's 30 coal-fired units, located at eight plants in the Carolinas. The targeted projects took place as early as 1988.

Duke's plants consist of multiple generating units, and each unit has a permit allowing operations at full capacity 24 hours per day, 365 days per year, subject to emissions rate limits. JA165. Of course, many factors determine whether a particular unit runs at any given time—principally, consumer demand. Each unit is part of the integrated electricity grid, and changes in fuel cost, the unit's operating cost, congestion on the grid, shutdowns of other units, and demand for electricity (which, in turn, depends on time of day, weather, and economic factors) determine when and for how long a given unit is run. See, *e.g.*, *Northern Ind. Pub. Serv. Co.* v. *Colorado Westmoreland, Inc.*, 667 F. Supp. 613, 616-19 (N.D. Ind. 1987) (describing an electric generating dispatch system).

Notwithstanding these unpredictable fluctuations, Duke's units must be ready to run whenever they are needed—particularly during peak periods such as the hottest summer weekdays. Thus, Duke must maintain its units so they will be available at peak times to meet its duty to provide a reliable electricity supply. See N.C. Gen. Stat. § 62-2; S.C. Code Ann. § 58-27-1510; S.C. Code Ann. Regs. 103-360.

Most of the projects at issue involved repairs to and replacements of boiler tube assemblies during regularly-scheduled outages. Pet. App. 29a.[7] Typically, these outages are planned for spring or fall when demand is relatively low, and they can last from several weeks to months. The other projects occurred during "extended cold shutdown" ("ECS")—a period when Duke's smallest units were not needed, principally because new nuclear units were sufficient to satisfy demand. During this period, Duke "made definitive plans for preserving and conditioning the units ... so they

[7] The "Buck 4" project was featured in the district court's decision because EPA sought summary judgment for that project, not because it was "representative" of all projects as Petitioners claim. *See* Pet. App. 26a n.3.

could be returned to service when demand dictated." Pet. App. 27a-28a; JA165-66. Duke also developed an enhanced maintenance program, the "Plant Modernization Program" ("PMP"), which involved consolidating projects so that they could be performed together. Pet. App. 28a; JA166. Although consolidated, the work was no different from the boiler and turbine repair and replacements commonly undertaken throughout Duke's system and the industry.

Throughout this time, Duke was in frequent contact with state regulators and informed them of the work to be done at its units. JA183-88. The agencies responded that re-starting the units after temporary shutdown would not trigger NSPS or PSD, so long as the units' permits were current and they remained in the States' emissions inventories. JA191-92 (North Carolina); JA189-90 (South Carolina).

State regulators also inspected Duke's plants regularly and witnessed the work being performed. Duke's records contain at least 23 inspection reports that include observations that units were under repair and certifications of compliance with all applicable air quality regulations. For example, during a 1987 permit renewal for Buck 4, the state permit writer observed: "Unit Nos. 3, 4 & 5 are currently in the Plant Modernization Program (PMP) ... until 1989," and noted that "PSD, NSR, [and] NSPS ... do not apply." JA197.

EPA, too, was aware of utility repair practices, including the "industry practice of engaging in life extension projects." Pet. App. 50a n.13. In the two decades before the "enforcement initiative," EPA conducted thousands of utility plant inspections. It visited plants while boiler component replacements were ongoing, but never cited them as PSD violations. *Id.* Indeed, EPA knew of many of the projects at issue here, but raised no questions about them. See *id.* Thus, accepting EPA's newly-minted interpretation of PSD would mean that the Agency ignored the law for two decades.

None of the projects at issue created any new or unregulated emissions, and none of the work allowed the units to

operate any differently than they had operated in the past. In fact, the parties stipulate that none of the projects increased the maximum achievable hourly emission rate of any of the units (*i.e.*, none was a "modification"). Pet. App. 88a-89a. Rather, Petitioners say Duke's projects enabled the facilities to respond more reliably to calls for electrical generation and thus should have been "projected to result in increased utilization of the units at issue." *Id.* at 88a.

In the district court, EPA moved for partial summary judgment on the question of how to calculate an "emissions increase," and Duke cross-moved for summary judgment. The district court held that the plain language of the 1980 Rules, the plain language of the statute, EPA's prior interpretations, and the *WEPCo* decision all demonstrated that EPA's position is wrong—because "in order to undergo 'construction' as defined in PSD, an existing source must also undergo a 'modification' as defined in NSPS." Pet. App. 63a. The Fourth Circuit affirmed. *Id.* at 19a.

By contrast, in the most recent appellate decision involving the enforcement initiative—issued after the Court granted *certiorari* in this case—the Seventh Circuit deferred to EPA's interpretation of its rules. See *United States* v. *Cinergy Corp.*, 458 F.3d 705 (7th Cir. 2006). However, the court did not address the argument that a "modification" is required before a "major modification" occurs. Instead, the court rested its decision on the observation that the "major modification" rules speak in terms of "annual" increases, not "hourly" increases—a point that no one disputes. *Id.* at 709-10. The court also pointed to a purported distinction between the purpose of the NSPS and PSD programs that no party argued and that does not exist, see *id.* at 710-11 (incorrectly stating that NSPS regulates "input," while PSD regulates "output"), and without further analysis simply deferred to EPA's interpretation.[8]

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[8] In an earlier case, the Eleventh Circuit vacated EPA's effort to impose its interpretation on TVA through an "exceedingly unusual," "ad hoc"

B. The D.C. Circuit Did Not Address EPA's Enforcement Position In *New York I*.

In 2002, while this case was being litigated, EPA promulgated new rules revising the "major modification" provisions. See 67 Fed. Reg. 80,186 (Dec. 31, 2002). These rules do not apply to the projects at issue—all of which occurred before 2002. Moreover, these rules likely will be superseded. See *infra* at 21. In any event, these rules look to whether a "project" results in an "actual-to-projected-actual" emissions increase—the test EPA now tries to distort the 1980 Rules to incorporate. 40 C.F.R. § 51.166(a)(7)(iv)(c) (2005).

All sides challenged the 2002 rules, and some moved to reopen their challenges to the 1980 and 1992 rules. The court consolidated the challenges and generally upheld the 2002 rules in an opinion issued after the decisions in this case. See *New York I*, 413 F.3d 3. Although the court rejected the argument that Congress adopted the NSPS rules wholesale into the PSD statute,[9] the court declined to address the Fourth Circuit's decision, "express[ing] no opinion as to whether Congress intended to require that EPA use identical regulatory definitions of modification across the NSPS and NSR programs." *Id.* at 19-20. The court also declined to address industry's challenge to a "new interpretation of the 1980 rule" articulated in later preambles, on the ground that it was unripe. *Id.* at 20. According to the D.C. Circuit, "[i]f there are still pending applications of the 1980 rule in which EPA attempts to employ the disputed [interpretation] ... judicial pro-

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administrative proceeding that "entirely ignore[ed] the concept of the rule of law." *TVA* v. *Whitman*, 336 F.3d 1236, 1240-41 & n.9, 1245-46 (11th Cir. 2003).

[9] In rejecting industry's challenge, the D.C. Circuit incorrectly read the NSPS regulations as including two, "inconsistent" definitions of "modification." *New York I*, 413 F.3d at 19-20 (citing 40 C.F.R. §§ 60.2(h), 60.14(b)). As EPA stated at the time of promulgation, the second regulation is not "inconsistent" with the first, but merely describes in detail the method for calculating emissions. *See* 39 Fed. Reg. at 36,947.

ceedings addressed to the application could solve the problem of any affected firm." *Id.* at 20-21.[10]

C. In October 2005, EPA Proposed A New Rule Abandoning Its Enforcement Position.

In October 2005, EPA proposed to resolve the confusion created by its enforcement initiative and to re-affirm its original standard for determining whether a "modification" has occurred—a standard that "is the same as that in the ... [NSPS] program." 70 Fed. Reg. at 61,081. Under the proposed rule, EPA will use the "same maximum achievable hourly emissions test [it] appl[ies] under NSPS to determine whether a physical change in or change in the method of operation ... results in an emissions increase." *Id.* at 61,088.

EPA admitted that the "approach [it has] been taking [in the enforcement initiative] leads to outcomes that have not advanced the central policy of the major NSR program." *Id.* In particular, EPA's enforcement position "discourages sources from replacing components, and encourages them to replace components with inferior components or to artificially constrain production in other ways," and "has impeded or resulted in the cancellation of projects that would have maintained and improved the reliability, efficiency, or safety of existing energy capacity." *Id.* at 61,094. These perverse effects occur because the standard applied in this litigation *assumes* that any component repair will cause the unit to run more hours and produce more emissions, even if the unit's actual emission rate will not change. See *Alabama Power*, 372 F. Supp. 2d at 1297. Thus, like the position rejected in *WEPCo*, EPA's enforcement initiative approach "assume[s] what [it] seek[s] to prove." 893 F.2d at 917. By contrast, the longstanding "modification" standard properly focuses on in-

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[10] The D.C. Circuit decision confirms that it is up to the regional courts to decide whether a new interpretation of the 1980 Rules withstands scrutiny—contrary to Petitioners' hyperbolic claim that the Fourth Circuit's decision was the most "serious affront" imaginable to D.C. Circuit's jurisdiction. Pet. Br. 2.

creases in an emission unit's actual emissions capacity, and thus "allow[s] owner/operators to make changes that, without increasing existing capacity, promote the safety, reliability, and efficiency" of their units. 70 Fed. Reg. at 61,093.

SUMMARY OF ARGUMENT

The court of appeals and district court correctly held that EPA improperly used this enforcement litigation to impose PSD pre-construction requirements where the statute and regulations do not apply.

I. As an initial matter, § 307(b) does not divest the courts of jurisdiction to address EPA's enforcement interpretation. Section 307(b) states that "[a]ction[s] of the Administrator with respect to which review could have been obtained" by filing an expedited "petition for review" in the D.C. Circuit are not reviewable in later enforcement proceedings. 42 U.S.C. § 7607(b)(1)-(2). This case does not involve "[a]ction[s] ... with respect to which review could have been obtained" in a petition to review the 1980 Rules. Duke does not contend the 1980 Rules are invalid; it contends EPA's subsequent re-interpretation of them is improper.

Nor could Duke have raised its objections to EPA's interpretation in 1980, for the simple reason that EPA did not interpret the regulations then as it does now. In 1980, EPA interpreted its regulations consistently with their plain language and the text of the CAA—as requiring an NSPS "modification" to trigger PSD "major modification" review. EPA articulated this interpretation in two contemporaneous determinations—which, although the United States attempts to disavow them, presented the Agency's authoritative view at the time. JA27-28; JA35-37. Had anyone filed a petition in 1980 contending EPA might change its position in the future, the petition would have been dismissed as unripe. Thus, to hold that EPA's position is unassailable here would insulate that position from challenge altogether. Given that the CAA carries criminal and civil penalties, this result would be inconsistent with fundamental fairness.

Allowing courts to address EPA's enforcement position in no way undermines the purposes of § 307(b), as the United States contends. If EPA wanted to obtain expedited D.C. Circuit review, it should have articulated its interpretation in a nationally applicable, prospective "final action," not in retrospective individual enforcement proceedings as it did here.

In any event, Petitioners' and the United States' contention that the courts below exceeded their jurisdiction is inseparable from their contention that those courts misconstrued the regulations. Because the Court thus must resolve the merits question, conflating the two serves no purpose.

Finally, Duke's objections to EPA's position were not raised in a challenge to the 1980 Rules. The 1981 brief the United States cites for this proposition raised an entirely different argument regarding EPA's method of "netting" emissions. And the D.C. Circuit in *New York I* refused to rule on EPA's later interpretations, instead deferring to pending enforcement proceedings for their resolution.

II. The plain language of the 1980 Rules establishes "modification" as the trigger for PSD "major modification" review. The 1980 Rules require PSD permits for "construction," which is defined to include "modifications." 40 C.F.R. § 51.166(i)(1), (b)(8). And the rules' "general provisions" define "modification" as it is defined under the NSPS rules and the Act. *Id.* §§ 51.100, 52.01(d). In promulgating this definition, EPA stated that it was intended to be "consistent with the definition used in" NSPS. 39 Fed. Reg. at 42,513. Thus, like NSPS, PSD applies only to projects that change a unit's basic emissions capacity—which always has been measured in terms of the unit's hourly emissions rate.

If an NSPS modification does occur at a unit, then the source's annual emissions are examined to see if the modification is "major." The structure of the "major modification" rule confirms that increases in operating hours do not trigger PSD. A "major modification" requires an increase in "actual emissions," which does not include increases in hours of op-

eration. 40 C.F.R. § 51.166(b)(2)(iii)(f). "Actual emissions" are measured on an annual basis using a constant, "representative" operating period prior to the change. *Id.* § 51.166(b)(21)(ii); *WEPCo*, 893 F.2d at 918 n.14. Thus, an "actual," "annual" emissions increase occurs only if a unit's hourly emissions rate increases—*i.e.*, if there is a change in the unit's fundamental ability to emit pollutants.

In 1981, EPA confirmed that these regulations mean what they say in two formal applicability determinations. These contemporaneous interpretations demonstrate the 1980 Rules' meaning and intent, which EPA cannot retroactively change through enforcement litigation.

III. EPA's enforcement interpretation is inconsistent with the Clean Air Act. The plain language of the statute limits PSD review to projects that are "modifications" under NSPS. See 42 U.S.C. § 7479(2)(C) (defining "modification" "as defined in section 7411(a) of this title"). The express incorporation of the NSPS concept of "modification" into PSD is irrefutable evidence that Congress intended to limit that concept under PSD. See *IBP, Inc.* v. *Alvarez*, 126 S. Ct. 514, 523 (2005). EPA cannot interpret the rules in a manner that violates this statutory restriction. See *Stinson* v. *United States*, 508 U.S. 36, 45 (1993).

Congress based the statutory PSD program on the preexisting regulatory PSD program, codifying certain provisions, modifying others, and rejecting others altogether. This selective incorporation further confirms that Congress deliberately chose the term "modification" to define the scope of PSD applicability to existing sources. *Lorillard* v. *Pons*, 434 U.S. 575, 582 (1978). The legislative debates similarly reflect Congress's intent to avoid imposing PSD's preconstruction requirements on existing sources as a general matter. See, *e.g.*, H.R. Rep. No. 95-294, at 185 (1977). By contrast, there is no mention in the statute or legislative history that Congress intended to apply this "new source" pro-

gram to existing facilities in an entirely different and much broader way than the CAA previously had applied to them.

If Congress had intended such a sweeping change, it surely would have said so. Not until the 1990 Acid Rain Amendments did Congress address the issue of long-term SO_2 and NO_x emissions from existing power plants. And in enacting those amendments Congress rejected the universal application of PSD controls in favor of a market-based trading program—which is incompatible with Petitioners' and the United States' approach here.

In the end, Petitioners and the United States invoke the purported purposes of PSD to avoid the statute's plain language. This approach violates basic principles of statutory construction. Moreover, it overstates the differences between PSD and NSPS, because both impose technological control requirements and both protect the ambient air. The language of the statute is the true indicator of how Congress intended to further its general purposes. And EPA's enforcement position is inconsistent with that language and intent.

ARGUMENT

I. THE COURTS BELOW HAD JURISDICTION TO CONSIDER EPA'S ENFORCEMENT INTERPRETATION.

Petitioners and the United States contend that the courts below lacked jurisdiction to address EPA's enforcement interpretation because Duke's objections to that interpretation "'could have been' resolved" in a petition to review the 1980 Rules in the D.C. Circuit pursuant to § 307(b)(1) of the Act. Pet. Br. 29; U.S. Br. 17. They are incorrect.

A. Duke Does Not Challenge The Validity Of The 1980 Rules, It Challenges EPA's 1999 Interpretation.

Section 307(b)(2) provides that "[a]ction[s] of the Administrator with respect to which review could have been obtained" through a petition for review pursuant to § 307(b)(1) "shall

not be subject to review in civil or criminal proceedings for enforcement." 42 U.S.C. § 7607(b)(2). Section 307(b)(1), in turn, authorizes "petitions for review" of certain "action[s] of the Administrator"—including "promulgating any national primary or secondary ambient air quality standard . . . or any other nationally applicable regulations promulgated, or final action taken, by the Administrator." *Id.* § 7607(b)(1). Any such challenge must be filed in the D.C. Circuit "within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register." *Id.*

In this case, there was no "[a]ction" that could have been the subject of a petition for review under § 307(b)(1). Duke objects to EPA's subsequent *interpretation* of its regulations, which the Agency created and attempted to apply in its 1999 enforcement initiative. Indeed, the issue of the proper interpretation of the 1980 Rules was first raised *by EPA* in this case, in a motion for summary judgment seeking a ruling that "emissions calculations for PSD applicability must ... consider future utilization." U.S. Mot. Summ. J. at 15.

In response to EPA's motion, Duke did not contend that the 1980 Rules are contrary to the statute or otherwise invalid. Rather, Duke argued that the plain language of the statute and the 1980 Rules do not support EPA's litigating position. The district court agreed, basing its analysis "on the PSD rules, the contemporaneous interpretations of the PSD rules, and the statutory language incorporating the NSPS concept of modification into PSD." Pet. App. 58a. Thus, the court did not "invalidate" the 1980 Rules. It merely rejected EPA's new interpretation as inconsistent with them.

In the Fourth Circuit EPA asked the court to "resolve th[e] question" whether it "'can interpret the statutory term modification under PSD differently from how' it has interpreted that term under NSPS." Pet. App. 15a n.7. "[N]o question as to the validity of the PSD regulations [was] presented ...." *Id.* Only after the Fourth Circuit signaled in a supplemental brief-

ing request that it was not accepting EPA's position did EPA argue that the court lacked jurisdiction. See *id.* at 21a.

This eleventh-hour argument is without merit. It is well established that the regional courts may consider agency interpretations of the PSD regulations, particularly in an enforcement action. See, *e.g.*, *WEPCo*, 893 F.2d at 914 n.6 (holding § 307(b) did not bar consideration of the question "whether the EPA properly applied these regulations"); *Puerto Rican Cement*, 889 F.2d at 296, 299 (considering whether EPA had applied an "arbitrary, and contradictory interpretation of EPA's own regulations"). Thus, the D.C. Circuit has required parties to challenge interpretations of these rules in individual proceedings rather than in omnibus rule challenges. See *New York I*, 413 F.3d at 21 (refusing to consider an interpretation of the 1980 Rules in favor of "judicial proceedings" in individual cases). And every court to consider EPA's enforcement interpretation has (usually on EPA's motion) resolved the issue on the merits. See *Cinergy*, 458 F.3d at 709; *United States* v. *Cinergy Corp.*, 384 F. Supp. 2d 1272, 1276 (S.D. Ind. 2005), *aff'd*, 458 F.3d 705; *Alabama Power*, 372 F. Supp. 2d at 1299-1300; *United States* v. *Ohio Edison Corp.*, 276 F. Supp. 2d 829, 862 (S.D. Ohio 2003); see also *United States* v. *American Elec. Power Serv. Co.*, 218 F. Supp. 2d 931, 951 (S.D. Ohio 2002).

Nor does § 307(b) bar courts from deciding "statutory questions" or "statutory" arguments as Petitioners and the United States imply. See, *e.g.*, Pet. Br. 3, 33 & nn.24-25, 37-38; U.S. Br. 17, 19. It bars the review of "*[a]ction* ... with respect to which review could have been obtained" under § 307(b)(1). 42 U.S.C. § 7607(b)(2) (emphasis added); see also *Madison Gas & Elec. Co.* v. *EPA*, 4 F.3d 529, 531 (7th Cir. 1993) ("Congress could have channeled all Clean Air Act cases to the D.C. Circuit but obviously decided not to."). An agency always is bound by the governing statute, even when interpreting its underlying rules. See, *e.g.*, *Stinson*, 508 U.S. at 45. If review (even "statutory" review) of an agency interpreta-

tion "could not have been obtained" via a petition for review, it is not barred by § 307(b)(2).

B. Duke Could Not Have Raised Its Arguments In An Expedited Petition Under § 307(b)(1).

Duke could not have challenged EPA's enforcement position in a petition for review in 1980 because EPA did not interpret its rules then the way it does now. To the contrary, at the time EPA interpreted its rules to require an NSPS "modification" to trigger a "major modification" analysis under PSD—as Duke contends they should be interpreted.

The rules as promulgated clearly provided that a PSD "major modification" first requires an NSPS "modification." 40 C.F.R. §§ 51.100, 52.01(d). The rules also made plain that increases in operating hours were neither "modifications" nor "major modifications," *id.* § 51.166(b)(2)(iii)(f), and EPA's own contemporaneous statements confirmed that this exclusion required an emissions rate increase. See *infra* at 36-37. For example, EPA's Director of its Division of Stationary Source Enforcement ("DSSE"), shortly after the rules were promulgated, twice announced that a project that causes an increase in a unit's hours of operation but does not increase the unit's hourly emissions rate is not a "modification" under PSD. JA27-28, 35-37. Although the United States now denigrates the Director as a "mid-level EPA official" who made an "incorrect" conclusion, U.S. Br. 28, the Director was charged by EPA with issuing official interpretations of the PSD rules. JA477-79. Moreover, there are no contrary Agency pronouncements, and the Director's determinations have previously served as "final agency action" subject to judicial review in this Court. See *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 583 n.2 (1980); *PPG Indus. Inc.* v. *Harrison*, 587 F.2d 237, 241-42 (5th Cir. 1979).[11]

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[11] EPA has posted these applicability determinations on its database of guidance documents, http://www.epa.gov/nsr/guidance.html. *See* http://www.epa.gov/Region7/programs/artd/air/nsr/nsrmemos/gastrbns.pdf (GE Determination); /crgilinc.pdf (Cargill Determination). A search conducted

Had anyone filed a petition in 1980 claiming that an increase in operating hours could not be a "major modification," it would have been dismissed as unripe. Section 307(b) cannot and does not grant jurisdiction to adjudicate hypothetical issues. See *Clean Air Implementation Project* v. *EPA*, 150 F.3d 1200, 1204 (D.C. Cir. 1998). Of course, "[a] necessary corollary [of this principle] is that if the issues later become justiciable, as a result for instance of an enforcement action, the petitioner may then raise those issues, notwithstanding" § 307(b)(2). *Id.* See also *Monsanto Co.* v. *EPA*, 19 F.3d 1201, 1203 n.2 (7th Cir. 1994) (observing that "judicial review 'could [not] have been obtained' under § 307(b)(1)," and thus would not be barred later, if no controversy existed at the time of a rule's promulgation) (alteration in original).

C. Insulating EPA's Position From Scrutiny Has No Basis In § 307(b) And Is Inconsistent With Fundamental Fairness.

The United States essentially is seeking a ruling that its enforcement position is insulated from review altogether, because that position was not articulated until decades after the time for challenging the 1980 Rules had expired. Given the substantial civil and criminal penalties that flow from a PSD violation, this Catch-22 argument cannot be reconciled with principles of fundamental fairness. See *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 284 (1978). It also would contravene the ordinary presumption that agency decisions are subject to judicial review. See *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 140 (1967).

Allowing a court to address EPA's interpretation in an enforcement action does not undermine the purposes of § 307(b). See U.S. Br. 18. Congress drafted § 307(b) to require expedited D.C. Circuit review of certain EPA actions—and *only* those actions. Where, as here, EPA attempts to impose new interpretations of its rules in multiple retrospective

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during the proceedings below found that the Director authored 105 of the 557 documents posted on that site. *See* Duke C.A. Br. 70 n.66.

enforcement actions, it necessarily exposes those interpretations to multiple instances of judicial scrutiny.

The way to ensure the uniform application and expeditious review of a new agency interpretation is to articulate that interpretation in nationally applicable "final action" published "in the Federal Register." 42 U.S.C. § 7607(b)(1). This well-recognized procedure has numerous benefits. These include providing the regulated community notice of and an opportunity to plan for a new interpretation—which is particularly important where, as here, complying with the interpretation would cost billions and recovery of those costs may require regulatory approval—and allowing comprehensive review on the basis of an administrative record. In return, Congress determined that agency decisions made and announced through such procedures deserve exclusive and expedited review under § 307(b), for all of the laudable reasons Petitioners and the United States extol. Because EPA has followed none of those requirements in this case, § 307(b) does not insulate EPA's interpretation from consideration now.[12]

D. Petitioners' And The United States' Jurisdictional Argument Is Inseparable From Their Argument That The Courts Below Erred On The Merits.

Petitioners' and the United States' claim that the courts below "offended" § 307(b) depends entirely upon their claim that those courts erred on the merits. Their arguments begin

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[12] Allowing EPA to insulate its interpretations from judicial review also would encourage agencies to promulgate vague regulations and implement policy through later, unreviewable interpretations. The regulated community, in turn, would be forced to challenge a host of hypothetical interpretations in expedited § 307(b) proceedings. Neither proposition is desirable as a matter of fairness to litigants or the orderly administration of the courts—particularly as similar expedited review provisions appear in a number of statutory schemes. *See, e.g.*, Consumer Product Safety Act, 15 U.S.C. § 2060(a); Federal Trade Commission Act, 15 U.S.C. § 57a(e)(1)(A); Federal Power Act, 16 U.S.C. § 825l(b); Clean Water Act, 33 U.S.C. § 1369(b); Federal Communications Act, 47 U.S.C. § 402(a).

by setting up a "straw man" mischaracterizing Duke's arguments and the decisions below. Specifically, Petitioners contend that Duke's position is that "the plain language of the [CAA] mandated that EPA adopt identical modification regulations for the NSPS and the NSR programs." They then assert that such a claim would have presented a "'facial' challenge" to the 1980 Rules. Pet. Br. 29-31; see U.S. Br. 19-25. But this does not accurately describe Duke's position—which is that there must be a "modification" before there can be a "major modification" under the 1980 Rules.

Petitioners' jurisdictional argument ultimately rests on the proposition that the district court's "reading" of the rules "is manifestly wrong." Pet. Br. 35. The United States goes even farther, presenting its entire regulatory argument in the jurisdictional section of its brief. U.S. Br. 20-35. In essence, Petitioners and the United States contend that their interpretation of the 1980 Rules is "correct" and any contrary argument is an attack on the rules that had to be brought under § 307(b). Conflating the jurisdictional and merits arguments in this manner renders the jurisdictional argument superfluous—which is presumably why EPA did not make the argument until its position on the merits was in jeopardy. The Court should reject this effort to expand the scope of § 307(b) and should reach the question whether EPA's enforcement position is consistent with the CAA and 1980 Rules.

E. Duke's Challenge Was Not Raised By Others Following The Promulgation Of The 1980 Rules.

Finally, the United States mischaracterizes a brief filed in 1981 by GM and others (the "*CMA* petitioners") to argue that parties *did* seek review of EPA's enforcement position in 1981. U.S. Br. 32-33. As noted above, that brief—which Duke did not join—contended that EPA's switch from a source-wide "design capacity" (or "potential-to-potential") test to a source-wide "actual emissions" test for the "major

modification" "netting" analysis violated the CAA. See *supra* at 11. That is not Duke's argument.[13]

Duke's contention is that an NSPS "modification" is required before a "major modification" analysis can occur. An NSPS "modification" occurs only if an increase in a unit's maximum achievable hourly emissions rate occurs. 40 C.F.R. § 60.14. As EPA has stated, "a test based on maximum achievable hourly emissions *is* a test based on actual emissions." 70 Fed. Reg. at 61,091 (emphasis added). This is the opposite of the *CMA* petitioners' position, which was that EPA violated the statute by using a test for a "net increase in actual rather than potential emissions." *CMA* Br. 17.

New York I, in turn, principally involved a challenge to the 2002 rules. Industry also challenged EPA's attempt to reinterpret the 1980 Rules, through preamble statements in the 1998 proposal and 2002 rules, to require an "actual-to-potential" test for projects at existing units, regardless of whether the unit has begun normal operations. *New York I*, 413 F.3d at 18. Industry alternatively contended that the 1980 Rules would be inconsistent with the Act if they were so interpreted and that a final rule with that meaning would not have been a "'logical outgrowth'" of the proposed rule. Joint Br. Industry Pet'rs at 34-36, *New York I*, No. 02-1387 (D.C. Cir. May 11, 2004). Moreover, although the D.C. Circuit did not agree that Congress adopted the NSPS rules wholesale into PSD, the court ultimately did not resolve industry's arguments, because it refused to pass on EPA's interpretation of the 1980 Rules. *New York I*, 413 F.3d at 19-20. Instead, the court held that the issue was unripe and observed that "judicial proceedings" involving "pending applications" of the 1980 Rules—*i.e.*, individual enforcement proceedings such as

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[13] The United States muddles the two arguments through loose use of the term "capacity," incorrectly treating "design capacity" (a measurement of emissions potential advanced by the *CMA* petitioners for netting purposes) and "actual capacity" (the measurement of actual emissions capability required by the 1980 Rules) as interchangeable. U.S. Br. 32.

this one—"could solve the problem of any affected firm." *Id.* at 20.

In short, the question whether EPA's enforcement interpretation of the 1980 Rules is proper has not been resolved by the D.C. Circuit and is not subject to the exclusive jurisdictional provision of § 307(b)—as even that court has held.

II. UNDER EPA'S RULES, A PROJECT IS A "MAJOR MODIFICATION" ONLY IF IT IS FIRST A "MODIFICATION," WHICH REQUIRES AN INCREASE IN A UNIT'S EMISSIONS RATE.

The PSD statute and rules require pre-construction review of a project at an existing unit only if that project is a "major modification." The plain language and structure of the rules compel the conclusion that a PSD "major modification" first requires an NSPS "modification"—a change that causes an increase in a unit's hourly emissions rate. A project that does not increase that emissions rate, even if it allows increased hours of operation, is not a "modification" and therefore *a fortiori* is not a "major modification."

A. The Plain Language Of The 1980 Rules Establishes An NSPS "Modification" As The Trigger For PSD "Major Modification" Review.

Consistent with the Act, the 1980 Rules require sources to obtain a permit before "begin[ning] actual construction" on a project that is subject to PSD. 40 C.F.R. § 51.166(i)(1). "Construction" means the "fabrication, erection, installation, demolition *or modification*" of a facility "which would result in a change in actual emissions." *Id.* § 51.166(b)(8) (emphasis added).[14]

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[14] *See also* 40 C.F.R. § 52.21(i)(1), (2) (requiring pre-construction permitting only for "modification[s] to which the requirements of paragraphs (j) through (r) of this section apply," and stating that "[t]he requirements of paragraphs (j) through (r) of this section" apply to "major modification[s]"); S.C. Code Ann. Regs. 61-62.5, Standard 7, § (i)(1), (2) (2001) (same).

The general provisions of both Parts of the 1980 Rules define "modification" as that term is defined under the Act—an NSPS "modification." The "general definitions" of Part 52 define "modification" as "any physical change in, or change in the method of operation of, a stationary source *which increases the emission rate* of any pollutant," excluding any increase in hours of operation, 40 C.F.R. § 52.01(d) (emphasis added). EPA stated in promulgating this definition that it was meant to be "consistent with the definition used in" NSPS. 39 Fed. Reg. at 42,513. Similarly, the "general definitions" section of Part 51, which contains no definition of "modification" but essentially mirrors Part 52, states that "all terms not defined herein will have the meaning given them in the Act." 40 C.F.R. § 51.100. Thus, under the 1980 Rules, a project at an existing unit is eligible for PSD review only if it is a "modification" as defined by Congress, which expressly incorporated the NSPS definition. If EPA had intended to eliminate "modifications" as a requirement for PSD review, it would have adopted a rule that said so.

Moreover, not all NSPS "modifications" are ultimately subject to PSD. PSD applies only to larger, source-wide increases that have significant air quality impacts. Reflecting this focus on "'major emitting facilit[ies],'" 42 U.S.C. § 7479(1), the 1980 Rules require pre-construction permitting only for those "modifications" at individual units that result in "major modifications" at the overall source. See 40 C.F.R. § 51.166(b)(2)(i).

The definition of "major modification" assures that PSD applies only to NSPS "modifications" that are "major." Indeed, the whole structure of the "major modification" provision confirms the conclusion that an NSPS "modification" is required to trigger a PSD "major modification" analysis. First, for a "major modification" to occur, any "increase" in actual emissions must result from a "physical [or operational] change," which even EPA concedes by definition excludes "[a]n increase in the hours of operation" unless restricted by

permit. *Id.* § 51.166(b)(2)(iii)(f). Since the inception of the new source rules, this "hours of operation exclusion" has assured that a "modification" would occur only where an hourly rate increase occurs. See 39 Fed. Reg. at 36,947 (explaining that the kg/hr test would "automatically allow increases in operating hours as intended by [the operating hours exclusion in] 40 C.F.R. 60.2(h)").

EPA excluded increases in operating hours from the PSD definitions of "modification" and "major modification," see 40 C.F.R. §§ 52.01(d), 51.166(b)(2)(iii)(f)—reasoning in part that Congress intended those terms "to include all exemptions included in the NSPS regulations promulgated . . . prior to the date of [PSD's] enactment." JA25; see also 49 Fed. Reg. at 43,213; 43 Fed. Reg. at 26,394; 68 Fed. Reg. at 61,269. Thus, a "major modification" analysis is required for an existing unit *only* where activity increases the hourly emissions rate—*i.e.*, only for "construction," which includes NSPS "modification[s]." 40 C.F.R. § 51.166(b)(8).

Second, a "major modification" occurs only if a project increases the "actual emissions" of a pollutant at the overall source. The rules include a single definition of "actual emissions" for units that have begun normal operations. "Actual emissions" are based on the average annual emissions during a period that is "representative of normal source operation." *Id.* § 51.166(b)(21)(ii). To determine whether an emissions increase will occur—and, if so, how large that annual emissions increase will be—"actual emissions" must be determined using the same representative period before and after the project. *Id.*; see also *WEPCo*, 893 F.2d at 918 n.14.

Once "actual," "annual" emissions are determined, sources may offset any emissions increase at the unit with contemporaneous decreases at the source. See 45 Fed. Reg. at 52,698. In this netting process, emissions increases and decreases are again expressed in total pollutant loads (tons per year), rather than in short-term emissions rates (kilograms per hour). But using constant, representative hours of operation for these

calculations ensures that an annual emissions increase is found only if a unit's hourly emissions rate increases, reflecting an increase in the unit's actual capacity to emit. See *Alabama Power*, 372 F. Supp. 2d at 1293; Pet. App. 60a.

B. EPA's Contemporaneous Interpretation Of The Rules Was That An NSPS "Modification" Is The Trigger For PSD "Major Modification" Review.

Immediately after the promulgation of the 1980 Rules, EPA issued authoritative determinations that a PSD "major modification" will not occur if an NSPS "modification" does not occur—and that an increase in hours of operation does not trigger "major modification" review.

In January 1981, EPA's Director of DSSE responded to an inquiry from a company that was considering adding a new unit (an ethanol plant), which would "cause a large increase in the hours of operation of the [existing] power plant and a fuel switch to burn coal exclusively." JA35. The Director followed a two-step process. First, he noted that the addition of the ethanol plant "should be considered a modification." Second, he addressed how "to determine if the modification is major and subject to pre-construction PSD review"—including by considering "netting" and "significance" levels. JA36. However, the Director went on to explain that "in the absence of any SIP or permit limitations, neither the increase in emissions from the [fuel] switch ... nor the increase in hours of operation at the power plant would be considered a modification," citing the hours of operation exclusion and its companion fuel switch exclusion. *Id.* (citing 40 C.F.R. § 52.21(b)(2)(iii)(e) & (f)). Thus, not only did the Director address the "modification"/"major modification" distinction, he also applied the hours of operation exclusion to a physical change that caused an increase in operating hours.

In June 1981, the Director issued a second formal applicability determination, regarding a project that would allow turbines to convert to natural gas. JA27-28. Noting that the units' emissions rates would decrease as a result of the pro-

ject, the Director stated that NSPS would not apply. JA27. Furthermore, because the hourly emissions rate would not increase, "[a]ctual emissions could increase only if there is an increase in the production rate or hours of operation." JA28. The Director again relied upon the hours of operation exclusion in determining that PSD review was not triggered. *Id.*

These authoritative EPA statements, issued at the time the 1980 Rules were promulgated, confirm the plain meaning of those rules. See, *e.g.*, *Ohio Dep't of Human Servs.* v. *HHS*, 862 F.2d 1228, 1234-35 (6th Cir. 1988); see also *Solid Waste Agency* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 168 (2001) ("*SWANCC*") (relying on agency's original interpretation, reflected in rules "promulgated two years after its enactment," to determine the meaning of a statute). Where, as here, a meaning "'is compelled by the regulation's plain language [and] by other indications of the [agency]'s intent at the time of the regulation's promulgation,'" that meaning controls. *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (quoting *Gardebring* v. *Jenkins,* 485 U.S. 415. 430 (1988)). Even if the rules were ambiguous as the United States contends, EPA may not reverse its interpretation by means of an enforcement action retroactively targeting twenty years of accepted practice. See *Alaska Prof'l Hunters Ass'n* v. *FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) (original authoritative interpretation of a rule can be changed only by prospective rulemaking, because "[t]hose regulated by an administrative agency are entitled to know the rules by which the game will be played" and to participate in the rulemaking process (quotation omitted)).

C. Petitioners' And The United States' Regulatory Arguments Are Incomplete And Incorrect.

Petitioners and the United States make three principal arguments to support their new interpretation of the rules at issue. First, they assert that Duke's position is not based on "*actual*" emissions. Pet. Br. 39 (emphasis added). Second, they contend that Duke's position ignores the PSD rules' use

of "*annual*" emissions. *Id.* at 40 (emphasis added). Third, they attack the district court's reliance on the hours of operation exclusion, claiming this provision excludes increased utilization *only* when it is "'unaccompanied by physical construction to the unit itself.'" *Id.* at 36; see U.S. Br. 25-29.

The first two arguments are red herrings. Duke's position is based upon an analysis of both "actual" and "annual" emissions. The NSPS hourly "emissions rate" test is an "actual emissions" test, as EPA itself has acknowledged. See 70 Fed. Reg. at 61,091 ("[A] test based on maximum achievable hourly emissions is a test based on actual emissions."). This is because "[t]he maximum achievable hourly emissions test measures what a source has been actually able to emit based on physical and operating capacity during a representative period prior to the change." *Id.* And Duke has never disputed that the "major modification" analysis uses "annual emissions"—*if* a "modification" first occurs. As the district court observed, a "significant net emissions increase" under the 1980 Rules "must be calculated on an annual basis [because] measuring emissions in tons per year makes possible netting (addition and subtraction) of emissions rates between various units at the plant." Pet. App. 64a-65a.

Petitioners' and the United States' attack on the hours of operation exclusion focuses on EPA's own 1981 applicability determinations, which they disparage as a "mid-level" official's errors. But, the Director was not "a low-level employee from an irrelevant division opining as to what he believed the appropriate interpretation of the EPA regulations should be"; he was "the head of the division at the EPA responsible for 'providing guidance for interpretations which address the implementation of [the PSD] regulations.'" Pet. App. 61a-62a (alteration in original). To "ensure uniform national policy.... [EPA] policy require[d] that DSSE ... make the final recommendation for interpretation of these requirements." JA479. Nor did DSSE make these determinations alone. For example, the Cargill Determination was "made with the concur-

rence of the Office of Air Quality Planning and Standards [OAQPS]"—the division that writes and promulgates CAA rules—"and the Office of General Counsel [OGC]." JA36.

At bottom, Petitioners' arguments seek to re-write the hours of operation exclusion to say that an increase in hours of operation "standing alone" does not constitute a modification. Pet. Br. 36 (regulation excludes increase in hours of operation only when increase is "'unaccompanied by physical construction'"). This argument contradicts the rules' plain language, which contains only one limitation: the increase in hours of operation must not exceed any permit limit. See 45 Fed. Reg. at 52,677, 52,698, 52704-05. EPA recognized as much in 1996, when it proposed to insert "standing alone" at the beginning of the exclusion in a proposed rule. See 61 Fed. Reg. 38,250, 38,254 (July 23, 1996). Adding a condition to a regulation that is not reflected in its text is not "interpretation." It is an attempt to change the rule. See *Christensen* v. *Harris County*, 529 U.S. 576, 588 (2000) ("To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.").[15]

Moreover, the "standing alone" condition makes no sense, because it implies that *any* change in a unit's hours of operation is a change in the "method of operation" that requires an express exclusion. Utilities change their hours of operation every day in response to demand, to weather, and to myriad other factors. That is not a "change in the method of operation"—it is how industry normally operates. Because

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[15] The United States incorrectly cites a "hypothetical" in the 1980 Preamble as demonstrating the "function" of the hours of operation exclusion. U.S. Br. 23-24 & n.6. In the hypothetical, the change in operating hours triggered PSD *only* because EPA "assum[ed] that the reviewing authority revised [the] permit to reflect" actual emissions before the change—meaning the new operations would exceed the revised permit limit. 45 Fed. Reg. at 52,705. The hypothetical says nothing about whether increased hours of operation within permit limits are ever "major modifications."

changes in hours of operation, standing alone, are not changes in the "method of operation," the "hours of operation" exclusion must do more.

In essence, Petitioners and the United States contend that in changing the "netting" methodology in 1980 EPA fundamentally redefined the "construction" that triggers preconstruction review and radically expanded the reach of the program to existing facilities never before subject to PSD, including under the 1974 and 1978 rules, and the 1979 proposed rules. In the preamble to the 1980 Rules, EPA did *not* say—as it contends now—that changing the netting provisions from "potential" to "actual" emissions would expand NSR applicability to activities at existing units that were not "modifications." To the contrary, EPA's economic analysis concluded that the 1980 "netting" methodology would result in *less* coverage than the 1979 proposal. See 45 Fed. Reg. at 52,729.

Finally, as the *amici curiae* States explain in detail and several courts have observed, EPA's enforcement position has never been the Agency's consistent interpretation of the rules—not even in this very litigation. See Br. States of Alabama *et al.*, at 10-13.[16] The United States concedes that EPA has attempted to interpret the rules to require two different emissions tests at an existing unit: the so-called "actual-to-potential" and "actual-to-projected-actual" tests. U.S. Br. 25 n.8 (suggesting that *which* interpretation is the Agency's true interpretation is not "important"). In fact, EPA advocated both tests at various times in the district court below. See Pet. App. 58a & n.17. This search for a test is the result of EPA's departure from the language of the rules. Indeed, if the 1980

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[16] Courts addressing the "enforcement initiative" have sharply criticized EPA for its inconsistent and result-oriented actions. *See, e.g., Alabama Power*, 372 F. Supp. 2d at 1306-07 (observing that EPA "has not spoken with one voice, or a consistent voice, or even a clear voice, on this issue"); *Ohio Edison*, 276 F. Supp. 2d at 832-33 (describing EPA's administration of NSR as an "abysmal breakdown"); *see also TVA*, 336 F.3d at 1240-41 & n.9, 1245-46, *quoted supra* at n.8.

Rules expanded the construction trigger from "modification" to any project that might affect utilization, then neither the 1992 nor the 2002 rule revisions would have been necessary. See 40 C.F.R. § 51.166(b)(21)(v) (1993) (adopting the optional "actual-to-projected-actual" test for electric generating units); *id.* § 51.166(a)(7)(iv)(c) (2005) (adopting the "actual-to-projected-actual" test for all sources, and establishing a "project[]" as the trigger for that test).

EPA's effort to retroactively "redefine PSD through enforcement actions and litigation" is "not the type of regulatory activity entitled to *Chevron* deference." *Alabama Power*, 372 F. Supp. 2d at 1306. At the least, no deference is due an agency's interpretation that has "fluctuated" in this manner as this "case has progressed." *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 539 n.29 (1982).

III. EPA'S ENFORCEMENT INTERPRETATION IS INCONSISTENT WITH THE ACT.

EPA's enforcement interpretation not only is inconsistent with the 1980 Rules, it also is inconsistent with the CAA itself. The plain text of the CAA requires an NSPS "modification" as the trigger for PSD review. And Congress's clear intention in enacting the 1977 Amendments was to avoid applying PSD to existing sources unless and until a "modification"—the meaning of which was well-established in 1977—occurred.

In the face of this plain language and clear intent, Petitioners and the United States invoke the purported purposes of NSPS and PSD. U.S. Br. 35-50; Pet. Br. 44-48. Even if their articulation of these purposes were correct, a general purpose does not trump statutory language. In the agency's "'anxiety to effectuate the congressional purpose of protecting the public,'" it "'must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop.'" *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). Petitioners and EPA would extend NSR review well beyond the language and clear intent of the statute.

A. Congress's Express Incorporation Of The NSPS Definition Into PSD Means That A PSD "Modification" Requires An NSPS "Modification."

The text of the CAA makes clear that a "modification" for PSD purposes requires a "modification" under NSPS. The statute thus bars EPA's enforcement position, which applies the PSD "major modification" analysis to projects that are not NSPS "modifications." See *Stinson*, 508 U.S. at 45 (no weight can be given to a regulatory interpretation that would "violate the Constitution or a federal statute").

Specifically, the NSR provisions prohibit facilities "on which construction is commenced" from beginning new source "construction" without undergoing pre-construction review and installing state-of-the-art emissions controls. 42 U.S.C. § 7475(a). Recognizing that some changes to existing sources are tantamount to the "construction" of a new source—as it did in enacting NSPS—Congress defined "construction" to include "modifications" to existing sources, as the term "modification" is "defined" and "used" under NSPS. See *id.* § 7479(2)(C) (PSD) ("The term 'construction' when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility."); see also *id.* § 7501(4) ("nonattainment" NSR) (defining "modification" to "mean the same as the term 'modification' as used in section 7411(a)(4)").

By incorporating the NSPS term "modification" and its definition into PSD, Congress limited the scope of "modifications" under PSD to those covered by NSPS. "The substantial relation between the two programs presents a classic case for application of the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (citations omitted). Here, not only did Congress use identical terms in two related parts of the CAA, but the NSR "modification" provisions expressly cross-reference and incorporate the NSPS "modification" provision.

This cross-reference to the existing NSPS provisions makes the presumption of uniform usage irrebutable. See *IBP*, 126 S. Ct. at 523-24 (concluding, in light of one part of a statute's "explicit reference to the use of [an] identical term" from another part of the statute, that "there is no plausible argument that these terms mean something different"). Petitioners' and the United States' contrary argument—that this cross-reference gave EPA discretion to expand the coverage of PSD dramatically beyond NSPS—makes a hash of statutory interpretation.

The United States contends Congress's cross-reference is merely a "shorthand reference [that] is not meaningfully different from a repetition of the Section 7411(a) definition." U.S. Br. 39. But the statute does not merely repeat the NSPS definition in the PSD sections; it defines "modification" for PSD as that term is "defined" and "used" for NSPS. Moreover, where Congress intended to repeat a definition in a separate provision of the Act, it did so. Compare 42 U.S.C. § 7412(a)(3) (defining "stationary source" by reference to the NSPS definition), with § 7412(a)(9) & (10) (repeating verbatim the NSPS definitions of "owner or operator" and "existing source"). Congress's deliberate choice to cross-reference a pre-existing definition as written and used, instead of merely repeating that same definition, must be given effect.

Petitioners' and the United States' attack on *Rowan Cos.* v. *United States*, 452 U.S. 247 (1981), also is wide of the mark. This case does not turn on *Rowan* alone. And *Rowan* simply presents one application of the uncontroversial canon that the same term ordinarily should be given the same meaning throughout a statute. Of course, the Fourth Circuit held that the express statutory cross-reference made that presumption "effectively irrebutable" here. Pet. App. 17a. This Court subsequently reached the same conclusion in *IBP*.

B. The Structure And Context Of The CAA Confirm That A PSD "Modification" Requires An NSPS "Modification."

When Congress enacted the 1977 PSD program, it did not write on a clean slate. The regulatory PSD program had been in existence since 1974. And Congress incorporated specific provisions of that program (including "modification" in § 52.01(d)) and rejected or "tightened" others (including "BACT" in § 52.01(f)). *Alabama Power*, 636 F.2d at 349-50. This selectivity shows that incorporation, where it occurred, was deliberate. See *Lorillard*, 434 U.S. at 582 ("This selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices [into the ADEA] strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the remedies and procedures of the FLSA [into the ADEA]."). Moreover, use of the pre-existing term "modification" "carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations." *Bragdon* v. *Abbott*, 524 U.S. 624, 631 (1998); see also *Toyota Motor Mfg., Ky., Inc.* v. *Williams*, 534 U.S. 184, 193-94 (2002).

Congress's awareness of and attention to the details of the pre-existing regulatory PSD program are clear from the face of the statute. As an initial matter, recognizing that it would take some time before new PSD rules would be promulgated and adopted into the SIPs, Congress instructed that the bulk of the pre-existing rules "shall remain in effect" and amended other provisions. See 42 U.S.C. § 7478(a). Moreover, where Congress intended the new PSD rules to differ from the existing NSPS and regulatory PSD, it said so. For example, Congress enacted a new definition of the term "commenced" and a new and more stringent BACT requirement. See *id.* §§ 7479(2)(A) (defining "commenced" differently than the pre-existing rules), 7479(3) (providing that BACT must be at least as stringent as the applicable NSPS, while the pre-existing PSD rules equated BACT with NSPS).

By contrast, Congress made no change in the existing definition of "modification." Not only did the 1977 Amendments leave that definition untouched, Congress expressly incorporated the NSPS definition and usage of modification into the NSR statutory programs. *Id.* §§ 7479(2)(C), 7501(4); see also 123 Cong. Rec. at 36,331. This is not the mere, mindless "re-enactment" of a pre-existing statutory provision, as the United States asserts. It reflects the conscious adoption and careful incorporation of that provision's pre-existing meaning.

Notably absent from the language and history of the statute is any suggestion that Congress intended or expected PSD to apply to a far broader category of existing sources than NSPS did, which would be the case under Petitioners' and the United States' reading. Neither agencies nor courts should presume that Congress authorizes weighty or wide-ranging changes through statutory language that strongly suggests stability. See, *e.g.*, *Brown & Williamson Tobacco Corp.*, 529 U.S. at 160 ("Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."); *Chisom* v. *Roemer*, 501 U.S. 380, 396 & n.23 (1991) ("[I]f Congress had such an intent, [it] would have made it explicit in the statute ...."). Simply put, if Congress in 1977 intended to expand PSD to tens of thousands of projects at existing power plants that neither NSPS nor regulatory PSD then reached, Congress would have said so in unmistakable terms, not by a technical and conforming amendment. There is not a word in the statute suggesting that Congress intended such a revolution—as EPA itself has conceded. See 49 Fed. Reg. at 43,213 ("If Congress had intended a change as to modifications [when it created NSR] it probably would have said so explicitly, yet it said nothing.").

The legislative history also confirms Congress's clear intent to limit the application of PSD to new and expanded sources, just as under NSPS. Congress consistently expressed its intention not to impose the cost of retrofitting new PSD controls

on existing units that simply maintain their capabilities, while ensuring that newly constructed or expanded units installed the best available controls. See, *e.g.*, H.R. Rep. No. 95-294, at 185 ("Building control technology into new plants at time of construction will plainly be less costly than requiring retrofit when pollution ceilings are reached."). Thus, the sponsor of the Senate bill stated that PSD would "apply only to new major emitting facilities and do not affect existing facilities." 123 Cong. Rec. 18,021 (1977) (Sen. Muskie).

Nothing in the legislative record suggests that Congress intended to extend PSD to existing sources that merely maintain their capacity. "[I]t tests the limits of reason to suggest that despite such silence, Members of Congress voting for those amendments intended to enact what would arguably be the single most significant change in" the application of PSD to existing sources. *Department of Commerce* v. *United States House of Reps.*, 525 U.S. 316, 342-43 (1999); see also *Chisom*, 501 U.S. at 396 & n.23 ("[I]f Congress had such an intent ... at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history ...."). In short, the PSD provisions reflect a congressional policy choice "not ... to cut back on emissions from existing major stationary sources through limitations on their productive capacity, but rather to ensure that they will install state-of-the-art pollution controls at a juncture where it otherwise makes [economic] sense to do so." 70 Fed. Reg. at 61,088. To effectuate this policy judgment, Congress directed EPA not to apply PSD to existing facilities, "since they and their emissions capacity are 'grandfathered.'" H.R. Rep. No. 95-294, at 144.

Other provisions of the statute further demonstrate that EPA's enforcement interpretation is wrong. Under the enforcement interpretation, PSD's BACT requirement would unavoidably be triggered, repeatedly, during the life of any industrial facility. However, as EPA has observed, an interpretation of the modification provision under which "all ma-

jor facilities eventually trigger NSR.... cannot be squared with the plain language of the CAA." 68 Fed. Reg. at 61,273. In particular, the imposition of BACT requirements at every electric utility would override the Acid Rain Program's flexible cap-and-trade mechanism.[17] Subsequent market-based regulatory provisions—specifically, the NO_x SIP Call, CAIR, and regional haze program[18]—are similarly premised on the expectation that existing coal-fired utility boilers will operate into the future without triggering PSD.

C. The "Purposes" Of PSD And NSPS Do Not Support EPA's Enforcement Interpretation.

The United States and Petitioners ultimately invoke the "purposes" of NSPS and PSD to argue that PSD can (as the United States claims) or must (as Petitioners claim) cover maintenance activities that allow an existing facility to continue operating as constructed and permitted to operate—thus expanding PSD coverage far beyond any activity that is a "modification" under NSPS and the statute. Cf. *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 340 (1997). They are incorrect.

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[17] Petitioners suggest that Congress's failure in 1990 to enact "proposals to amend the Act's PSD provisions to exclude modernization projects like the one at issue in *WEPCo*," means Congress intended NSR to apply broadly to existing utility boilers. *See* Pet. Br. 15. The courts repeatedly have declined to search for a prior Congress's intent in a later Congress's failure to enact proposed legislation. *See SWANCC*, 531 U.S. at 170-71; *Pension Benefit Guar. Corp.* v. *LTV Corp*, 496 U.S. 633, 650 (1990).

[18] CAIR establishes a cap-and-trade program to address transport of pollution in the eastern United States. 70 Fed. Reg. 25,162 (May 12, 2005). *See also* E.P.A., *Basic Facts On CAIR*, *at* http://www.epa.gov/cair/basic.html (last visited Aug. 6, 2006). The regional haze program establishes visibility protection for national parks and other areas, 42 U.S.C. §§ 7491, 7492, and its regulations require power plants to install Best Available Retrofit Technology ("BART"). *See* E.P.A., *Fact Sheet - Final Amendments to the Regional Haze Rule and Guidelines for Best Available Retrofit Technology (BART) Determinations*, *available at* http://www.epa.gov/visibility/fs_2005_6_15.html (last visited Aug. 6, 2006).

To the extent the United States and Petitioners rely on the remedial purposes of PSD, they improperly are elevating one statutory purpose over all others. Like most legislation, PSD is a compromise among purposes: "to protect public health and welfare from any actual or potential adverse effect" of air pollutants and "to insure that economic growth will occur ... consistent with the preservation of existing clean air resources." 42 U.S.C. § 7470(1), (3); see also 123 Cong. Rec. 26,841 (1977) (Sen. Muskie) ("[T]he conference agreement on the Clean Air Act ... is a compromise in every sense of the term."). It is wrong to use one of these purposes to override the Act's plain language. "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 525-26 (1987).

Of course, some PSD provisions are more stringent than the NSPS provisions, as Petitioners repeatedly note. But the statute specifies exactly *how* PSD should apply more stringently. PSD applies to more pollutants and more source categories than NSPS. And when a source triggers PSD, it must comply with the complicated PSD pre-construction permitting process and install BACT, which may be more stringent than the "applicable [NSPS]." 42 U.S.C. § 7479(3). These provisions reflect Congress's judgment as to the manner in which to tighten NSPS—and they do not include the radical expansion of the "modification" concept that Petitioners and the United States advocate here.[19]

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[19] The principal decisions that Petitioners and the United States rely upon reflect instances where Congress has adopted a specific requirement for PSD—for example, the different statutory definitions of "source" and of "commenced." *See* Pet. App. 16a-18a (discussing *Potomac Elec. Power Co.* v. *EPA*, 650 F.2d 509 (4th Cir. 1981) and *Northern Plains Res. Council* v. *EPA*, 645 F.2d 1349 (9th Cir. 1981)); *id.* at 64a-67a (discussing *Alabama Power* and *Northern Plains*). They do not stand for the proposi-

Petitioners' and the United States' further descriptions of the differing purposes of NSPS (as a "technology-based" program) and PSD (as an "ambient air quality" program) also are misguided. Both NSPS and PSD protect ambient air quality, and both NSPS and PSD regulate emissions "output" through technological requirements. As EPA has explained, "the decision to develop the NSPS is clearly based on ambient air quality concerns," 45 Fed. Reg. at 52,692—specifically, the need to protect the NAAQS, which are "ambient" air quality standards. And, as the BACT provisions make clear, PSD imposes technology-based controls, regardless of whether such level of control is actually needed to protect air quality. See 42 U.S.C. § 7479(3).[20]

Construing the 1980 Rules so that PSD is triggered only if there is NSPS modification activity at an existing unit, and then only if the source-wide emissions exceed a *de minimis* threshold, effectuates both the technology and air quality purposes of PSD. However, this is the result of different definitions of "source," not "modification," under NSR and NSPS. And it is implemented through the regulatory concept of "major modification," which *narrows* the universe of activities subject to the more stringent technology requirements of PSD by limiting PSD applicability to "modifications" that might have "major" impacts on air quality.

Petitioners also argue that pre-construction permit coverage must include activities that consume the PSD "increment[s]." Pet. Br. 40-41. This argument "conflates the different yet complementary functions of [pre-construction] review and calculation of increment consumption." *Alabama Power*, 636 F.2d at 378. The statute and rules provide the remedy for increment consumption, which is the requirement that States

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tion that differences in NSPS and PSD alone justify departing from consistent statutory language.

[20] The Seventh Circuit's statement that PSD limits "output (pollution)," while the NSPS limits "inputs (technology)" is simply wrong. *Cinergy*, 458 F.3d at 711.

must review air quality and take "corrective action" if the increments are exceeded. See 45 Fed. Reg. at 52,677; 40 C.F.R. § 51.166(a)(3)-(4). It is not the expansion of the "modification" provision. Indeed, PSD has never covered all activities that affect ambient air quality or potentially consume increment. For example, it does not cover "non-modification" activity (*e.g.*, a fuel switch or increases in operating hours allowed by permit), and it does not cover the construction of sources that are not "'major emitting facilit[ies].'" 42 U.S.C. § 7479(1). Under Petitioners' reasoning, each of the PSD rules' exclusions would be improper, as each involves activity that potentially consumes increment but is not subject to pre-construction review. This cannot be correct.

* * * *

In the end, Petitioners' and the United States' arguments do not comport with longstanding law and policy or common sense. For 35 years, and at the time Congress enacted the 1977 Amendments, the NSPS rules provided that a "modification" occurs if and only if a project will convert an existing source into a "new source," by increasing the emission rate. This requirement was incorporated into the subsequent regulatory and statutory PSD programs. EPA is not free to interpret its rules in this enforcement action to abandon the "modification" requirement and radically and retroactively expand the scope of the rules.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court of appeals.

Respectfully submitted.

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ADDENDUM A

STATUTES

42 U.S.C. § 7411. Standards of performance for new stationary sources

(a) Definitions

For purposes of this section:

* * * *

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

* * * *

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

* * * *

42 U.S.C. § 7470. Congressional declaration of purpose

The purposes of this part are as follows:

(1) to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate[1] to occur from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air),[2] notwith-

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[1] So in original. Probably should be "anticipated".

[2] So in original. Section was enacted without an opening parenthesis.

standing attainment and maintenance of all national ambient air quality standards;

(2) to preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historic value;

(3) to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources;

(4) to assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other State; and

(5) to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.

42 U.S.C. § 7475. Preconstruction requirements

(a) Major emitting facilities on which construction is commenced

No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless—

(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;

(2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has

been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

(3) the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter;

(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility;

(5) the provisions of subsection (d) of this section with respect to protection of class I areas have been complied with for such facility;

(6) there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;

(7) the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source; and

(8) in the case of a source which proposes to construct in

a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under section 7411 of this title has been promulgated subsequent to August 7, 1977, for such source category, the Administrator has approved the determination of best available technology as set forth in the permit.

* * * *

42 U.S.C. § 7479. Definitions

For purposes of this part—

(1) The term "major emitting facility" means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities. Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facili-

ties which are nonprofit health or education institutions which have been exempted by the State.

(2)(A) The term "commenced" as applied to construction of a major emitting facility means that the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations and either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.

(B) The term "necessary preconstruction approvals or permits" means those permits or approvals, required by the permitting authority as a precondition to undertaking any activity under clauses (i) or (ii) of subparagraph (A) of this paragraph.

(C) The term "construction" when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility.

(3) The term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of "best available control technology" result in emissions of any pollutants which will exceed the emissions

allowed by any applicable standard established pursuant to section 7411 or 7412 of this title. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to November 15, 1990.

* * * *

42 U.S.C. § 7501. Definitions

For the purpose of this part—

* * * *

(4) Modifications; modified

The terms "modifications" and "modified" mean the same as the term "modification" as used in section 7411(a)(4) of this title.

42 U.S.C. § 7607. Administrative proceedings and judicial review

* * * *

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any

other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title,,[2] under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the

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[2] So in original.

finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

ADDENDUM B

1987 CODE OF FEDERAL REGULATIONS

40 C.F.R. § 51.100 Definitions.

As used in this part, all terms not defined herein will have the meaning given them in the Act:

(a) "Act" means the Clean Air Act (42 U.S.C. 7401 et seq., as amended by Pub. L. 91-604, 84 Stat. 1676 Pub. L. 95-95, 91 Stat., 685 and Pub. L. 95-190, 91 Stat., 1399.)

* * * *

40 C.F.R. § 51.166 Prevention of significant deterioration of air quality.

* * * *

(a)(3) Required plan revision. If the State or the Administrator determines that a plan is substantially inadequate to prevent significant deterioration or that an applicable increment is being violated, the plan shall be revised to correct the inadequacy or the violation. The plan shall be revised within 60 days of such a finding by a State or within 60 days following notification by the Administrator, or by such later date as prescribed by the Administrator after consultation with the State.

(a)(4) Plan assessment. The State shall review the adequacy of a plan on a periodic basis and within 60 days of such time as information becomes available that an applicable increment is being violated.

* * * *

(b) Definitions ... :

(b)(1)(i) "Major stationary source" means:

(b)(1)(i)(a) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per

year or more of any pollutant subject to regulation under the Act: Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants, fossil fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(b)(1)(i)(b) Notwithstanding the stationary source size specified in paragraph (b)(1)(i)(a) of this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of any air pollutant subject to regulation under the Act; or

* * * *

(b)(2)(i) "Major modification" means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.

* * * *

(b)(2)(iii) A physical change or change in the method of operation shall not include:

(b)(2)(iii)(a) Routine maintenance, repair, and replacement;

(b)(2)(iii)(b) Use of an alternative fuel or raw material by reason of any order under sections 2 (a) and (b) of the Energy

Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plan pursuant to the Federal Power Act;

(b)(2)(iii)(c) Use of an alternative fuel by reason of an order or rule under section 125 of the Act;

(b)(2)(iii)(d) Use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(b)(2)(iii)(e) Use of an alternative fuel or raw material by a stationary source which:

(b)(2)(iii)(e)(1) The source was capable of accommodating before January 6, 1975, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975 pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Subpart I or 40 CFR 51.166; or

(b)(2)(iii)(e)(2) The source is approved to use under any permit issued under 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.166;

(b)(2)(iii)(f) An increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Subpart I or 40 CFR 51.166.

(b)(2)(iii)(g) Any change in ownership at a stationary source.

(b)(3)(i) "Net emissions increase" means the amount by which the sum of the following exceeds zero:

(b)(3)(i)(a) Any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and

(b)(3)(i)(b) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

* * * *

(b)(4) "Potential to emit" means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

* * * *

(b)(8) "Construction" means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in actual emissions.

(b)(9) "Commence" as applied to construction of a major stationary source or major modification means that the owner or operator has all necessary preconstruction approvals or permits and either has:

(b)(9)(i) Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(b)(9)(ii) Entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

(b)(10) "Necessary preconstruction approvals or permits" means those permits or approvals required under federal air

quality control laws and regulations and those air quality control laws and regulations which are part of the applicable State Implementation Plan.

(b)(11) "Begin actual construction" means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operation this term refers to those on-site activities, other than preparatory activities, which mark the initiation of the change.

* * * *

(b)(21)(i) "Actual emissions" means the actual rate of emissions of a pollutant from an emissions unit, as determined in accordance with paragraphs (b)(21)(ii)-(b)(21)(iv)(iv) of this section.

(b)(21)(ii) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. The reviewing authority may allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

* * * *

(b)(21)(iv) For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

* * * *

(b)(23)(i) "Significant" means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate

Carbon monoxide: 100 tons per year (tpy)

Nitrogen oxides: 40 tpy

Sulfur dioxide: 40 tpy

Particulate matter: 25 tpy

Ozone: 40 tpy of volatile organic compounds

Lead: 0.6 tpy

Asbestos: 0.007 tpy

Beryllium: 0.0004 tpy

Mercury: 0.1 tpy

Vinyl chloride: 1 tpy

Fluorides: 3 tpy

Sulfuric acid mist: 7 tpy

Hydrogen sulfide (H T22S): 10 tpy

Total reduced sulfur (including H T22S): 10 tpy

Reduced sulfur compounds (including H T22S): 10 tpy

(b)(23)(ii) "Significant" means, in reference to a net emissions increase or the potential of a source to emit a pollutant subject to regulation under the Act that paragraph (b)(23)(i) of this section, does not list, any emissions rate.

(b)(23)(iii) Notwithstanding paragraph (b)(23)(i) of this section, "significant" means any emissions rate or any net emissions increase associated with a major stationary source or major modification, which would construct within 10 kilome-

ters of a Class I area, and have an impact on such area equal to or greater than 1 1/4g/m [FN3] (24-hour average).

* * * *

(i) Review of Major Stationary Sources and Major Modifications—Source Applicability and Exemptions

(i)(1) The plan shall provide that no major stationary source or major modification shall begin actual construction unless, as a minimum, requirements equivalent to those contained in paragraphs (j) through (r) of this section have been met.

* * * *

40 C.F.R. § 52.01 Definitions.

All terms used in this part but not defined herein shall have the meaning given them in the Clean Air Act and in Parts 51 and 60 of this chapter.

* * * *

(d) The phrases "modification" or "modified source" mean any physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any pollutant for which a national standard has been promulgated under Part 50 of this chapter or which results in the emission of any such pollutant not previously emitted, except that:

(d)(1) Routine maintenance, repair, and replacement shall not be considered a physical change, and

(d)(2) The following shall not be considered a change in the method of operation:

(d)(2)(i) An increase in the production rate, if such increase does not exceed the operating design capacity of the source;

(d)(2)(ii) An increase in the hours of operation;

(d)(2)(iii) Use of an alternative fuel or raw material, if prior to the effective date of a paragraph in this part which imposes

conditions on or limits modifications, the source is designed to accommodate such alternative use.

* * * *

40 C.F.R. § 52.21 Prevention of significant deterioration of air quality.

* * * *

(i) Review of Major Stationary Sources and Major Modifications—Source Applicability and Exemptions

(1) No stationary source or modification to which the requirements of paragraphs (j) through (r) of this section apply shall begin actual construction without a permit which states that the stationary source or modification would meet those requirements. The Administrator has authority to issue any such permit.

(2) The requirements of paragraphs (j) through (r) of this section shall apply to any major stationary source and any major modification with respect to each pollutant subject to regulation under the Act that it would emit, except as this section otherwise provides.

* * * *

40 C.F.R. § 60.2 Definitions.

* * * *

"Modification" means any physical change in, or change in the method of operation of, an existing facility which increases the amount of any air pollutant (to which a standard applies) emitted into the atmosphere by that facility or which results in the emission of any air pollutant (to which a standard applies) into the atmosphere not previously emitted.[21]

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[21] Formerly 40 C.F.R. § 60.2(h).

* * * *

40 C.F.R. § 60.14 Modification.

(a) Except as provided under paragraphs (e) and (f) of this section, any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies shall be considered a modification within the meaning of section 111 of the Act. Upon modification, an existing facility shall become an affected facility for each pollutant to which a standard applies and for which there is an increase in the emission rate to the atmosphere.

(b) Emission rate shall be expressed as kg/hr of any pollutant discharged into the atmosphere for which a standard is applicable. The Administrator shall use the following to determine emission rate:

* * * *

(e) The following shall not, by themselves, be considered modifications under this part:

(e)(1) Maintenance, repair, and replacement which the Administrator determines to be routine for a source category, subject to the provisions of paragraph (c) of this section and § 60.15.

(e)(2) An increase in production rate of an existing facility, if that increase can be accomplished without a capital expenditure on that facility.

(e)(3) An increase in the hours of operation.

(e)(4) Use of an alternative fuel or raw material if, prior to the date any standard under this part becomes applicable to that source type, as provided by § 60.1, the existing facility was designed to accommodate that alternative use. A facility shall be considered to be designed to accommodate an alternative fuel or raw material if that use could be accomplished under

the facility's construction specifications as amended prior to the change. Conversion to coal required for energy considerations, as specified in section 111(a)(8) of the Act, shall not be considered a modification.

(e)(5) The addition or use of any system or device whose primary function is the reduction of air pollutants, except when an emission control system is removed or is replaced by a system which the Administrator determines to be less environmentally beneficial.

(c)(6) The relocation or change in ownership of an existing facility.

(f) Special provisions set forth under an applicable subpart of this part shall supersede any conflicting provisions of this section.

(g) Within 180 days of the completion of any physical or operational change subject to the control measures specified in paragraph (a) of this section, compliance with all applicable standards must be achieved.

ADDENDUM C

1993 CODE OF FEDERAL REGULATIONS

40 C.F.R. § 51.166 Prevention of significant deterioration of air quality.

* * * *

(b) Definitions. All state plans shall use the following definitions for the purposes of this section. Deviations from the following wording will be approved only if the state specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definitions below:

* * * *

(21)(v) For an electric utility steam generating unit (other than a new unit or the replacement of an existing unit) actual emissions of the unit following the physical or operational change shall equal the representative actual annual emissions of the unit following the physical or operational change, provided the source owner or operator maintains and submits to the reviewing authority, on an annual basis for a period of 5 years from the date the unit resumes regular operation, information demonstrating that the physical or operational change did not result in an emissions increase. A longer period, not to exceed 10 years, may be required by the reviewing authority if it determines such a period to be more representative of normal source post-change operations.

* * * *

(32) Representative actual annual emissions means the average rate, in tons per year, at which the source is projected to emit a pollutant for the two-year period after a physical change or change in the method of operation of a unit, (or a different consecutive two-year period within 10 years after that change, where the reviewing authority determines that such period is more representative of normal source opera-

tions), considering the effect any such change will have on increasing or decreasing the hourly emissions rate and on projected capacity utilization. In projecting future emissions the reviewing authority shall:

(i) Consider all relevant information, including but not limited to, historical operational data, the company's own representations, filings with the State or Federal regulatory authorities, and compliance plans under title IV of the Clean Air Act; and

(ii) Exclude, in calculating any increase in emissions that results from the particular physical change or change in the method of operation at an electric utility steam generating unit, that portion of the unit's emissions following the change that could have been accommodated during the representative baseline period and is attributable to an increase in projected capacity utilization at the unit that is unrelated to the particular change, including any increased utilization due to the rate of electricity demand growth for the utility system as a whole.

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No. 05-848

In the Supreme Court of the United States

ENVIRONMENTAL DEFENSE, ET AL., PETITIONERS

v.

DUKE ENERGY CORPORATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES AS RESPONDENT SUPPORTING PETITIONERS

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REPLY BRIEF FOR THE UNITED STATES AS RESPONDENT SUPPORTING PETITIONERS

Perhaps the most significant aspect of Duke's brief is what it does not say: Duke offers no defense of the court of appeals' central holding that the New Source Performance Standards (NSPS) and Prevention of Significant Deterioration (PSD) regulatory definitions must be identical, and instead characterizes the court's rationale as merely a "straw man" (Br. 31) that does not reflect Duke's position. Also remarkable, however, is what Duke *does* embrace as its position. For the first time ever in this case, Duke asserts that a series of regulatory provisions, whose alleged significance had somehow escaped the attention of the regulators and the regulated alike, requires that a separate regulatory definition of "modification" set forth in a different part of the regulations actually applies of its own independent force in the PSD context, serving as a sort of threshold hourly-rate test that must be met before the PSD definition of "major modification" even comes into play. Br. 23, 28, 33-34. Duke's arguments lack merit, and should be rejected.

Duke seeks to bolster its new and implausible legal arguments by erroneously suggesting that EPA's contrary interpretation was adopted only in 1999 (Br. 2) and by exaggerating the real-world impact of EPA's position. In reality, EPA consistently stated and reaffirmed its current position during the entire time period relevant to this case (see, *e.g.*, U.S. Br. 27-28 & n.9; notes 7-8, 10, *infra*), and that longstanding position has not had the drastic consequences posited by Duke. According to Duke, EPA's interpretation means that PSD "would unavoidably be triggered, repeatedly, during the life of any industrial facility." Br. 46. Under the 1980 and 1992 rules that control this case, however, PSD requirements would not apply to maintenance work performed by Duke at one of its facilities if the work (a) constituted routine maintenance, repair, or replacement;

(b) resulted in emissions increases that were cancelled out by contemporaneous emissions reductions; (c) resulted in emissions increases that were not "significant"; (d) restored a temporarily disabled unit to service; or (e) did not result in increased actual annual emissions. 40 C.F.R. 51.166(b)(2), (3), (21) and (23). (Unless otherwise indicated, this brief cites to the 1987 regulatory recodification.) This Court's review in this case should proceed from the position consistently advanced by EPA and required by its rules, not the caricature offered by Duke and its amici.[1]

I. THE COURT OF APPEALS EXCEEDED ITS JURISDICTION

A. Section 307(b) Precluded The Judgment Below

1. As previously demonstrated (U.S. Br. 35-50), the court of appeals erred in holding that "modification" must "be interpreted identically in the [NSPS and PSD] programs." Pet. App. 17a.[2] But more fundamentally, the court of appeals erred in even reaching that question, because the purported "identical[ity]" requirement would operate to invalidate the regulations. The

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[1] Duke's contention (Br. 3) that it conducted its modifications "in full view and with the knowledge of EPA and the state authorities" is incorrect. Mere knowledge of the existence of a maintenance project does not provide knowledge that the project is a PSD "major modification." For just that reason, States such as North Carolina cannot and do not conduct PSD evaluations as part of routine inspections. See, *e.g.*, J.A. 333 ("[W]ithout doing rather extensive and complex testing you really can't make definitive statements as to whether a facility is in compliance" for PSD.); J.A. 344-345 (State did not perform PSD evaluation during inspections of Duke facilities); J.A. 347 ("[J]ust from the inspection and looking at the boiler, you couldn't say it is subject to PSD or not."); J.A. 363 (PSD "determinations are not made in the field."); see also J.A. 386 (Duke's primary permitting employee never told the State about the projects alleged in the complaint.).

[2] The government reiterates that, because the statutory term "modification" is ambiguous, EPA retains discretion to adopt other reasonable definitions of that term that may differ from those in the 1980 and 1992 PSD regulations. U.S. Br. 47-48 n.18, 50 n.20.

PSD regulations—which do not so much as mention an hourly-rate emissions test, repeatedly refer to "actual emissions," and measure emissions in "tons per year"—cannot be read to apply the hourly test found in the NSPS regulations, and contain provisions for netting and determining significant levels of emissions that are undisputedly absent from the NSPS regulations, as Duke concedes (Br. 34-35). Thus, if the court of appeals were right that Congress required the meaning of "modification"—including the resolution of any ambiguities in that term—to be "identical[]" in the two programs, the effect would necessarily be to invalidate one or the other set of regulations as contrary to the Clean Air Act (CAA). As the Seventh Circuit has recently explained, because the PSD "regulation does not define [modification] as a change in the hourly emissions rate," an argument that it must be defined that way "seems an attack on the validity of the regulation rather than an argument about its meaning, and issues of validity * * * are beyond the jurisdiction of a regional circuit to resolve." *United States* v. *Cinergy Corp.*, 458 F.3d 705, 709 (2006). The court of appeals exceeded its jurisdiction under Section 307(b)(2), 42 U.S.C. 7607(b)(2).

2. The Section 307(b)(2) preclusion is particularly clear in this case, because Duke actually *did* participate in a D.C. Circuit case involving a claim that the 1980 and 1992 PSD regulations were unlawful because the CAA requires EPA to apply a maximum hourly emissions test for PSD. See U.S. Br. 32-35. Review of Duke's current assertions thus "could have been obtained" on a petition for review and is precluded in an enforcement action like this one. 42 U.S.C. 7607(b)(2).

Duke's contention (Br. 20, 23, 32) that it could not have raised in the D.C. Circuit the issue that the court of appeals decided in this case is wrong. As set forth in our opening brief (at 33), the question whether the Act required an hourly-rate PSD test was raised in the challenge to the 1980 rules in the D.C. Circuit, which resulted in a settlement agreement in which the parties

agreed that EPA would propose *amending* the regulations to delete language requiring an "actual, annual" test and add a test based on "potential to emit (as calculated in terms of pounds of pollutant emitted per hour)." Settlement Agreement at 2 & Exh. B (Petitioner has requested leave to lodge the agreement with this Court per Sup. Ct. R. 32.3.). Ultimately, the D.C. Circuit decided that very challenge in *New York* v. *United States EPA*, 413 F.3d 3 (2005). See *id.* at 19-20 (ruling on industry's challenge to "the 1980 rule's definition of modification in the NSR context to the extent that it differs from the NSPS definition"); U.S. Br. 33-35.

B. Petitioner Offers No Defense Of The Court Of Appeals' Holding

Duke makes no effort to defend the reasoning or holding of the court of appeals. Indeed, in response to the government's showing that the CAA cannot plausibly be read to require EPA to "adopt identical modification regulations for the NSPS and NSR programs," Duke asserts that the government has attacked a "straw man" that "does not accurately describe Duke's position." Br. 31. But, whether or not Duke wishes to defend it, that is precisely what the court of appeals held. See Pet. App. 14a ("Congress intended the statutory definitions of 'modification' in the PSD and NSPS provisions to be interpreted identically"); *id.* at 17a.[3]

Duke thus concedes that the court of appeals' holding was incorrect. Moreover, Duke makes no effort to dispute the government's showing that the court of appeals' holding effectively invalidated the PSD regulations. Accordingly, Duke offers no

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[3] The *sole* basis for the court of appeals' ruling was its view that the NSPS and PSD regulations must be "identical[]." Indeed, the court conceded that it would be permissible for the PSD regulations to "be enforced as the EPA urges"—but only if "the NSPS regulations are similarly interpreted and enforced." Pet. App. 15a n.7; see *id.* at 18a.

basis on which this Court could avoid the conclusion that Section 307(b)(2) precluded the court of appeals from undertaking the statutory review that provides the essential underpinning for its judgment. The Court should therefore reverse the judgment of the court of appeals.

II. DUKE'S ARGUMENTS ARE INCONSISTENT WITH THE REGULATORY TEXT AND EPA'S INTERPRETATIONS

It is common ground in this case that PSD review applies only to "[m]ajor modification[s]." 40 C.F.R. 51.166(b)(2)(i). For the first time in this case, however, Duke now advances the argument (Br. 23, 28, 33-34, 36-37) that, by virtue of provisions never previously relied on in this case, a regulatory definition of "modification" set forth in a different part of the regulations applies of its own force as an independent threshold requirement in the PSD context as well. In Duke's latest view, a "major modification" for PSD purposes must first be shown to be a "modification" for NSPS purposes because "[t]he general provisions of both Parts of the 1980 rules define 'modification' as * * * an NSPS 'modification.'" Br. 34.

Duke's new theory that the regulations impose an independent "modification" requirement in the PSD context is patently incorrect. The text of the regulations, EPA's consistent interpretations, and the relevant case law have uniformly established that PSD "major modifications" are neither a subset nor a superset of NSPS "modifications," but rather are a distinct concept of "modification" that EPA has tailored to the varied needs of the PSD program over time. Duke's belatedly discovered regulatory "modification" argument should be rejected.

A. The Regulations Preclude Duke's New Position

1. Duke's new regulatory theory is irreconcilable with the language and structure of the PSD regulations themselves. Nowhere do those regulations provide or suggest that PSD is triggered only by changes that first qualify as "modification[s]" un-

der the NSPS regulations. Indeed, while the PSD regulations consistently focus on actual, annual increases and measurements in tons per year, the PSD regulations do not even mention the NSPS test or any hourly-rate measurement. Nor can it be argued that EPA somehow intended to apply the NSPS test *sub silentio*; where EPA intended a reference to the NSPS rules, it made that intent explicit.[4]

Far from imposing the NSPS "modification" test as a separate prerequisite for PSD coverage, the PSD regulations instead make clear that a "major modification" is sufficient *in itself* to trigger PSD applicability. See 40 C.F.R. 51.166(i)(1) ("no * * * major modification shall begin actual construction" unless it satisfies the PSD requirements). The PSD regulations define "major modification" without reference to the distinct NSPS "modification" concept, and use terminology that differs in crucial respects from the NSPS regulatory definition. See U.S. Br. 20-23. And to the extent that Duke's argument rests on the suggestion that the regulatory test for "modification" must be read into the "major modification" concept because the latter phrase also uses the word "modification," that suggestion is refuted by the unambiguous regulatory text. "'Major modification' *means* any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase." 40 C.F.R. 51.166(b)(2)(i) (emphasis added). There is no room in that definition for an additional threshold inquiry

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[4] See, *e.g.*, 40 C.F.R. 51.166(b)(12) (BACT under PSD must comply with "any applicable standard under 40 CFR parts 60 and 61," which govern NSPS); 40 C.F.R. 51.166(b)(16)(i) (PSD emissions standards must be at least as stringent as "[t]he applicable standards as set forth in 40 CFR parts 60 and 61"); 40 C.F.R. 51.166(b)(17) ("*Federally enforceable* means all limitations and conditions which are enforceable by the Administrator, including those requirements developed pursuant to 40 CFR Parts 60 and 61."); 40 C.F.R. 51.166(j)(1)) (requiring a major source or modification to "meet each applicable emissions limitation under the [SIP] and * * * under 40 CFR parts 60 and 61").

under the NSPS test for "modification." Indeed, any such inquiry would render much of the PSD definition entirely superfluous, because the NSPS test likewise requires a physical or operational change. 40 C.F.R. 60.14(a).

2. Duke's new theory of an independent "modification" requirement is based on three regulatory provisions that are said to make an NSPS "modification" a prerequisite to a PSD "major modification." First, Duke cites 40 C.F.R. 51.166(b)(8)—a provision that it has never previously cited in this case—for the proposition that "'Construction' *means* the 'fabrication, erection, installation, demolition, *or modification*' of a facility." Br. 33 (first emphasis added); see Br. 23, 35. Duke's quotation elides a key word; the regulation does not state that construction "*means*" modification, but rather that construction "means any physical change," "*including*" modification. 40 C.F.R. 51.166 (b)(8) (emphasis added). Thus, the regulation provides no support for Duke's view that PSD is *limited* to NSPS "modifications."

Second, Duke relies (Br. 2, 10, 23, 28, 34) on another regulation it has never previously cited in this litigation, which provides that "all terms not defined herein will have the meaning given them in the Act." 40 C.F.R. 51.100. That provision has no application, because the term "major modification" *is* defined in the regulations (without mention of NSPS or an hourly-rate test). In any event, as the court of appeals recognized, the statutory definition of "modification" at 42 U.S.C. 7411(a)(4) permits either an "hourly rate" test or an "actual, annual increase" test. See Pet. App. 15a n.7, 18a. Thus, even if 40 C.F.R. 51.100 were applicable here, it would not advance Duke's new theory.

Third, Duke cites (Br. 2, 10, 23, 28, 34-35) the definition of "modification" found at 40 C.F.R. 52.01(d). The Part 52 regulations, however, are simply inapplicable in this case. They apply only in the absence of an EPA-approved state SIP, see 40 C.F.R. 52.21(a); 45 Fed. Reg. 52,676 (1980), but the state SIPs in this case were approved by EPA. See U.S. Br. 4 n.2; Duke Br. 10 n.3.

Moreover, state SIPs are required to (and do) incorporate the regulations in Part 51, *not* Part 52. See 40 C.F.R. 51.166(a)(1) and (b); N.C. Admin. Code tit. 15A r.2D.0530; S.C. Code Ann. Regs. 61-62.5, std. 7. And Section 52.01(d) is expressly limited to a narrower category of pollutants than the PSD program covers, so it would be nonsensical to apply it to PSD.

In any event, the Section 52.01(d) definition of "modification" was part of the 1974 PSD regulatory program, which was replaced by EPA's 1978 and 1980 regulations at 40 C.F.R. 51.166 and 52.21. See 45 Fed. Reg. at 52,735. Not surprisingly, then, Duke identifies no relevant instances post-dating promulgation of the 1980 regulations in which EPA has relied on 40 C.F.R. 52.01(d) in the PSD context. Nor, with the exception of one case involving violations of the pre-1980 PSD regime, has Section 52.01(d) been cited at all, for any reason, by any federal court since 1980, with the exception of one case involving violations of the pre-1980 PSD regime. See *United States* v. *Chevron U.S.A., Inc.*, 639 F. Supp. 770, 778 (W.D. Tex. 1985) (1977-1979 violation). Indeed, Duke itself did not make its newfound argument (or cite Section 52.01(d)) in the court of appeals or in its brief in opposition in this Court.[5]

B. Duke's New Theory Conflicts With The Consistent Views Expressed By EPA And The Courts

Duke's new regulatory theory conflicts not only with the PSD regulations themselves, but with EPA's consistent interpretation of those regulations. The first rules proposed after enactment of the 1977 CAA amendments, for example, make clear that PSD

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[5] While Duke did cite Section 52.01(d) once in the district court, in its brief in support of its summary judgment motion (at 6 n.12), it did so in a footnote giving the history of the regulations and in the course of arguing that Congress in 1977 codified the pre-1977 PSD regulations. It did not make its current regulatory argument in the district court or otherwise argue that Section 52.01(d) has continuing effect for PSD purposes.

applicability was determined by reference to the "major modification" definition, not some separate definition of "modification." See, *e.g.*, 42 Fed. Reg. 57,480 (1977) ("Sources subject to PSD review will be those identified in the proposed definitions of 'major stationary source' and 'major modification.'); 44 Fed. Reg. 51,948, 51,952 (1979) ("The term 'major modification' serves as the definition of 'modification' or 'modified' when used in the Act in reference to a major stationary source."). EPA made the same point explicitly when it later adopted rules and amendments. 45 Fed. Reg. at 52,677 (the "primary criterion in determining PSD applicability is whether the proposed project is * * * a major modification"); 57 Fed. Reg. 32,316 (1992) ("The EPA's regulations implementing the PSD and nonattainment programs require preconstruction review for sources undertaking a 'major modification.'"); 70 Fed. Reg. 61,088 (2005) (PSD contains a definition of "major modification" but not "modification"). EPA never discussed an hourly-rate test, or use of the NSPS regulations or definition of modification, in determining the applicability of PSD.

In addition, courts addressing the scope of the PSD program have relied solely on the regulatory term "major modification." See *New York*, 413 F.3d at 14 (noting that in 1980 "EPA changed its definition of modification. The final 1980 rule defined the term as follows: '"[m]ajor modification" means any physical change in or change in the method of operation.'");[6] *Wisconsin Elec. Power Co.* v. *Reilly*, 893 F.2d 901, 915 (7th Cir. 1990)

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[6] In *New York*, Duke itself recognized that, under the 2002 PSD regulations, "a project is deemed a 'modification' if it is expected to cause a significant net increase in annual emissions, *even if it does not increase the unit's maximum hourly emission rate and there is no increase in the facility's permitted capacity*," and Duke unsuccessfully attacked the regulations on that very basis. Industry Br. at 23, *New York*, *supra* (emphasis added); see *New York*, 413 F.3d at 20. None of the provisions on which Duke relies for its new regulatory argument—40 C.F.R. 51.100, 51.166(b)(8), 52.01(d)—was altered in 2002.

(*WEPCO*) (PSD regulations "define their key term" in "major modification" definition); *Puerto Rican Cement Co.* v. *United States EPA*, 889 F.2d 292, 295-297 (1st Cir. 1989) (Breyer, J.) (finding unit subject to PSD based on "actual emissions" provision of "major modification"); *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 399-400 (D.C. Cir. 1980) (PSD review is limited to "major modification," which is "EPA's [r]egulatory [d]efinition of '[m]odification'"). In short, as the Seventh Circuit recently concluded in *Cinergy*, Duke's newly minted regulatory theory is "makeweight." 458 F.3d at 711.

C. Duke's Other Arguments That The PSD Regulations Require An Hourly-Rate Test Are Mistaken

Apparently as an alternative to its new regulatory theory, Duke argues (Br. 35-39) that an hourly-rate test is also required by two provisions in the PSD definition of "major modification" itself—namely, the "hours of operation" exclusion and the definition of "actual emissions." Duke's interpretation of the "major modification" test fares no better than its newly devised substitute theory.

1. As previously explained (U.S. Br. 26-28), the plain language of the "hours of operation" exclusion makes clear that it has no bearing on a case like this one. The exclusion is expressly limited to the physical-or-operational-change prong of the PSD definition of major modification, and provides that "[a]n increase in the hours of operation" will not itself satisfy that prong. 40 C.F.R. 51.166(b)(2)(iii)(*f*). It has no application when a change *other than* an increase in hours of operation is at issue. Thus, once a physical change has been identified, as here, the exclusion by its own terms can do no further work.[7]

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[7] Duke contends (Br. 39) that EPA's 1996 proposal to add the words "standing alone" to the "hours of operation" exclusion somehow confirms Duke's contention about the meaning of the exclusion. In 1996, EPA did consider making such an amendment in order "to make the existing exclusion

Ultimately, Duke rests (Br. 36-39) its "hours of operation" argument on the two isolated examples of a contrary interpretation by Mr. Reich in 1981. Mr. Reich's misreading of the hours of operation exclusion cannot trump the plain language of the regulation or EPA's statements repeatedly confirming the limited scope of the exclusion. Duke baldly asserts (Br. 28) that "there are no contrary Agency pronouncements," but that assertion is patently incorrect, as it ignores the long history of authoritative agency explanations expressly taking the same position advocated by EPA here.[8] Those explanations are plainly entitled to deference, because they reflect the agency's interpretation of its own regulations. *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

2. Duke also contends (Br. 23-24, 35) that the proper test for "major modification" must measure a unit's "actual emissions" by keeping the hours of operation constant based on pre-change hours of operation. In Duke's view, EPA must ignore net pollution increases caused by a source's increased hours of operation resulting from a physical change even when, as here, increasing the number of hours the source can operate is the express purpose of the change. See J.A. 230; Pet. App. 27a-28a.

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explicitly clear," but it also expressly reaffirmed its longstanding "view that the regulatory exclusion for certain increases in a source's * * * hours of operation applies only when such an increase is unaccompanied by construction or modification activity." 61 Fed. Reg. 38,254 (1996).

[8] See, *e.g.*, J.A. 44 (1988 determination that PSD is triggered by "increases in emissions due to increases in hours of operation or production rate where, as here, such operational or production increases are closely related to physical or operational changes"); J.A. 257-258 (1988 determination that increases in "hours of operation" "inextricably intertwined with the physical changes" should be considered under PSD); J.A. 294 (1989 determination that increased hours of operation "if attributable to a physical or operational change, can trigger an emissions increase for PSD purposes"); U.S. Br. 26-28 & n.9; pp. 8-10, *supra*; p. 14 & note 10, *infra*.

Duke is mistaken. Measuring "actual emissions" based on "actual operating hours," 40 C.F.R. 51.166(b)(3)(i) and (21)(ii), requires post-change emissions for units that have begun normal operations to be measured based on their projected actual operating hours after the change. See U.S. Br. 20-23; *Cinergy*, 458 F.3d at 708 (concluding that the "natural reading" of the "major modification" regulation "is that any physical change or change in operating methods that increases *annual emissions* is covered," and that annual emissions are measured based on "the *total number of hours* that the plant is in operation") (emphasis added); 56 Fed. Reg. 27,633 & n.10 (1991).

Duke's reliance (Br. 35) on the regulatory language defining actual emissions by reference to emissions during a "representative" period is unavailing, because that language merely describes how to establish the *pre-change* emissions baseline. 40 C.F.R. 51.166(b)(21)(ii); see 57 Fed. Reg. at 32,316-32,317 (provision establishes baseline); *WEPCO*, 893 F.2d at 916 (same). The PSD regulations require an examination of the "increase in *actual* emissions" over that baseline (40 C.F.R. 51.166(b)(3)(i)(*a*) (emphasis added)), and thus mandate consideration of the *actual* projected or potential future emissions (see U.S. Br. 6-7), not a counterfactual assessment of what future emissions *would* be if post-change hours of operation were held to pre-change levels.

3. As explained (U.S. Br. 7-8), the 1992 regulations provide that most projects at electric utilities are evaluated under an actual-to-projected-actual test that expressly considers "the effect [a] change will have on increasing or decreasing the hourly emissions rate and *on projected capacity utilization*." 40 C.F.R. 51.166(b)(32) (1993) (emphasis added). Even if there were any uncertainty about the meaning of the 1980 regulations, such uncertainty would have been eliminated in the 1992 regulatory

amendments, which govern some of the projects at issue in this case. See U.S. Br. 20 n.4.[9]

4. Duke repeatedly asserts (Br. 1-3, 15-16, 28-29, 36-37) that its interpretation of the regulations has been obvious to all since 1980. That resort to revisionist history is irrelevant to the question presented here, which turns on the regulations' plain language and EPA's explanations. In any event, Duke's assertion that the government is now advancing only an "enforcement position" (Br. 2, 16, 28) and that the 1980 rules "clearly provided that a PSD 'major modification' first requires an NSPS 'modification'" (Br. 28) is refuted by the actual history, which shows EPA's longstanding adherence to its "enforcement position."

EPA announced in 1980 that the regulations measure increases in "actual emissions," calculated in "tons per year." 45 Fed. Reg. at 52,677, 52,700, 52,705; U.S. Br. 23-24. By the late 1980s, EPA was issuing PSD applicability determinations that unquestionably applied a total annual emissions test without requiring an increase in hourly emissions before a "major modification" could be found. See note 8, *supra*. Indeed, the *WEPCO* and *Puerto Rican Cement* suits were actions brought against EPA based on its application of that very standard, which both

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[9] Duke is wrong to imply (Br. 14 n.4) that the government has changed positions with respect to whether the 1992 rules apply in this case. The government has consistently argued that the 1992 rules apply to projects undertaken after the time those rules were incorporated into the applicable SIP. Gov't C.A. Br. 6; Gov't Opp. to Duke Summ. J. Mot. 7-8. Duke also errs in contending (Br. 14) that, if industry fails to submit records as required by the 1992 regulations, the analysis defaults to an NSPS-type test under which hours of operations must, counterfactually, be deemed to remain constant. As discussed in text, the 1980 PSD regulations take increases in hours of operation into account in assessing emissions increases. The 1992 amendments merely allow utilities to avoid undergoing the fact-intensive regulatory analysis of whether they have "begun normal operations" to determine whether they must apply the actual-to-potential test or the more favorable actual-to-projected-actual test. 57 Fed. Reg. at 32,317; U.S. Br. 7-8.

courts upheld. *WEPCO*, 893 F.2d at 916 & n.11; *Puerto Rican Cement*, 889 F.2d at 296-298; see *New York*, 413 F.3d at 15. Later, in 1990, EPA specifically rejected any test limited to a comparison of maximum hourly rates as "not fairly discernible from any reading of the [1980] regulations." J.A. 67. EPA confirmed shortly thereafter that the actual-to-projected-actual test would continue to apply under the 1980 regulations when a unit has begun normal operations. 56 Fed. Reg. at 27,633 & n.10. EPA has regularly reiterated that the PSD regulations apply an actual, annual emissions test that could be triggered by physical or operational changes that increase emissions due to their effect on hours of operation.[10]

In fact, the record reflects that Duke and the rest of the utility industry understood EPA's interpretation. The settlement of the original D.C. Circuit challenge to the 1980 regulations, which required EPA to consider *amending* the regulations to authorize an hourly-rate test, makes that point clear. So do numerous other documents in the record dating from as early as 1989.[11]

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[10] 56 Fed. Reg. at 27,630 (stating that unlike NSPS, "the NSR regulations examine total emissions into the atmosphere"); *ibid.* (demonstrating that the methodology for calculating emission increases for NSPS and PSD is entirely different); 57 Fed. Reg. at 32,316, 32,328, 32,335; 61 Fed. Reg. 38,254 (1996) (PSD emissions calculation involves determination of "how many hours per year the source will be operated"); 63 Fed. Reg. 39,858-39,859 (1998) (confirming the emissions test depends on total annual emissions, not maximum hourly rates); J.A. 68 (PSD can be triggered by changes in "capacity utilization"); J.A. 72-75 (PSD applicability determined by examination of the changes in the actual annual emissions, not the hourly rate); J.A. 155 (1991 EPA statement to Congress that emissions increases are measured "on an hourly basis (for NSPS purposes) or an annual basis (for PSD and nonattainment new source review purposes)").

[11] See J.A. 243 (1991 Duke compliance manual statement that PSD is based on "annual emissions" and can be triggered if a change causes a unit to be "*operated more frequently*") (emphasis added); see also J.A. 269, 274, 275 (6/5/89 industry letter recognizing EPA requires PSD review where there is no increase in emission rates); J.A. 496 (1/90 study contrasting PSD regulations

III. THE ACT DOES NOT REQUIRE AN HOURLY-RATE TEST

Duke contends (Br. 41-47) that Congress specifically limited PSD coverage to projects that result in an increase in a unit's hourly emissions rate. That argument is barred by Section 307(b)(2), because it would require invalidation of the PSD regulations. Moreover, in order to trump the deference ordinarily due to an agency's interpretation of a statute under *Chevron*, Duke's argument requires finding in the statutory cross-reference an "unambiguously expressed intent of Congress" to require use of an hourly-rate test in the PSD program. *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984). No such intent is discernible here.

A. Congress Expressed No Intent To Condition PSD Modifications On A Finding Of An NSPS Modification

Duke's argument distorts the natural reading of the statutory cross-reference at 42 U.S.C. 7479(2)(C). That PSD provision provides that "construction when used in connection with any source or facility, includes * * * modification (as defined in section 7411(a)(4) of this title)." Section 7411(a)(4) is a statute governing NSPS; it contains no reference to or incorporation of

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with NSPS); J.A. 380 (11/28/90 e-mail stating that in evaluating whether a project is a "major modification," "[t]he primary consideration should be whether the work will allow any greater utilization (more emissions)"); J.A. 376 (11/2/90 internal Duke memo noting that application of PSD "will also depend on the projected use of the new boilers versus the old boilers"); J.A. 371 (1995 internal training materials noting, under heading "avoiding PSD," "no increased capacity utilization, except for increased power demand"); J.A. 368 (2/13/95 internal Duke memo noting that "PSD regs disallow an increase in hr of operation not attributed to increased electric demand"); see also *WEPCO*, 893 F.2d at 916 n.11 ("Despite WEPCO's protestations, we note initially that the EPA's refusal to apply the 'production rate/hours of operation' exclusion was proper.").

the NSPS regulations.[12] Duke's assertion (Br. 5) that Congress intended by that cross-reference to "include[] only activities that in essence create a 'new source'" is improbable. Congress's evident purpose in cross-referencing the pre-existing statutory definition of "modification" was to ensure that PSD requirements apply not only to new construction (as would be the case if the cross-reference did not exist), but also to changes at *existing* sources that increase emissions. *New York*, 413 F.3d at 13. In addition, by adopting the definitional cross-reference, Congress ensured that the term "modification" incorporated certain statutory qualifications. See 42 U.S.C. 7411(a)(8) (certain coal conversions not a "modification" for purposes of Section 7411(a)(4)).

According to Duke (Br. 45), Congress showed no intention that PSD should apply to "projects at existing power plants that neither NSPS nor regulatory PSD" reached prior to 1977. But Congress simply did not address the question, and in any event, with respect to sources and pollutants that are potentially subject to both programs, the regulations provide that the category of "modifications" for PSD purposes is different from—but not necessarily broader or narrower than—NSPS "modifications." In some respects the PSD category is broader, in that some physical or operational changes may result in increased utilization (and therefore in PSD applicability) even though they do not result in an increased hourly rate of emissions that triggers NSPS. But the PSD category is substantially narrower in other respects, because it permits "netting" of contemporaneous emis-

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[12] Contrary to Duke's argument (Br. 43), the statute does not "define[] 'modification' for PSD as that term is 'defined' and 'used' for NSPS." Instead, it defines "modification" for PSD as that term is defined and used in the NSPS *statute*. The difference is significant, because the NSPS statute (as opposed to the regulations) is entirely agnostic as to the use of an hourly-rate test or an actual, annual emission test. See *New York*, 413 F.3d at 19; Pet. App. 15a n.7.

sions increases and decreases, and applies only to "significant" increases. See U.S. Br. 22-23, 30-31.

Nor is Duke's position bolstered by its passing reference (Br. 42-43) to the "identical terms" canon. As the government has explained (U.S. Br. 38-46), that canon lacks force in this context. Tellingly, moreover, Duke's reliance on that canon reflects substantial ambivalence: Duke carefully avoids any suggestion that the NSPS and PSD regulations must actually define the statutory term "modification" in an identical manner, as would be required if the "identical terms" canon were applicable here. Duke's reluctance is no doubt attributable to the fact that Duke desires to extend the NSPS hourly-rate test to the PSD context, but without thereby depriving itself of the substantial *benefits* conferred by other differences between the NSPS and PSD definitions, such as the "netting" provision. See Duke Br. 34-36; U.S. Br. 23, 30-31. Duke understandably wishes to have its cake and eat it too, but canons of statutory construction must be applied evenhandedly, or not at all.[13]

In any event, Congress's failure to express a clear intent regarding the scope of the statutory term "modification" does not *deprive* EPA of authority; such ambiguity *confers* on EPA the discretion to interpret that definition by regulation. See U.S. Br. 45-46 & n.17. That conclusion follows from a straightforward application of *Chevron*, and no case cited by Duke holds otherwise. See *Cinergy*, 458 F.3d at 711.

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[13] Duke argues (Br. 43) that "[t]his case does not turn on *Rowan* [*Cos.* v. *United States*, 452 U.S. 247 (1981),] alone," and it offers *IBP, Inc.* v. *Alvarez*, 126 S. Ct. 514, 523 (2005), as further support for its position. The court of appeals, however, did rely exclusively on *Rowan*, see Pet. App. 11a-18a, which cannot be read to authorize the irrebuttable presumption of identical meaning applied by the court of appeals. See U.S. Br. 38-46. And *IBP* provides no support for Duke's (or the court of appeals') argument. *IBP* stands for the unremarkable proposition that a reference to "*said* principal activity or activities" means the same principal activities referred to earlier in the statute. 126 S. Ct. at 523-524 (emphasis added).

B. Congress Did Not Incorporate Any Regulatory Definition of Modification Into The PSD Provisions

Because the statutory language says nothing about an hourly-rate test or how to measure emissions increases, Duke argues (Br. 44) that Congress either incorporated or ratified the pre-existing regulatory interpretation of "modification," which did apply an hourly test. As the D.C. Circuit concluded in *New York*, however, there is no indication that, by incorporating a pre-existing *statutory* provision, Congress meant to codify and freeze in place the pre-existing *regulations* governing modifications. *New York*, 413 F.3d at 18-19; see U.S. Br. 50 n.20. While Congress no doubt tacitly approved the NSPS hourly-rate test as one permissible approach for PSD, it did not *mandate* that test. *Helvering* v. *Reynolds*, 313 U.S. 428, 432 (1941). This Court has concluded that Congress's use of a pre-existing statutory term demonstrated its intent to incorporate a pre-existing regulatory definition only when it has found additional clear demonstrations of such congressional intent in the statute or legislative history. See *Bragdon* v. *Abbott*, 524 U.S. 624, 631-632 (1998) (citing statutory language prohibiting use of lesser standard than incorporated in agency regulations); *FDIC* v. *Philadelphia Gear Corp.*, 476 U.S. 426, 437-438 (1986) (noting legislative history specified that statutory definition included prior existing regulatory definition). Duke cites no such indications in the statutory PSD provisions.

Moreover, Duke's insistence that Congress in 1977 expressed a detailed "awareness of * * * the pre-existing regulatory PSD program" (Br. 44) merely underscores that Congress would have made explicit any intent to mandate an approach to modifications, as it did with other regulatory provisions. *New York*, 413 F.3d at 19. To be sure, one provision of the 1977 amendments, 42 U.S.C. 7478(a), did, as Duke says (Br. 44), "instruct[] that the bulk of the pre-existing rules 'shall remain in effect' and

amended other provisions" of the pre-existing PSD rules. Duke's quotation of Section 7478(a), however, is selective. Section 7478(a) provides that, "[u]ntil such time as an applicable implementation plan is in effect for any area," most of the pre-existing rules "shall remain in effect." 42 U.S.C. 7478(a). The full statutory text makes clear Congress's intent that, once state implementation plans were in place, EPA would be free to retain or change the pre-existing regulations.

C. Duke's Remaining Arguments Ignore The Plain Language Of The Act

Duke further contends (Br. 45-46) that EPA's interpretation violates a purported congressional intent to limit PSD application to "newly constructed or expanded units." Duke cites no statutory language to support the proposition that PSD can apply only to new or expanded facilities, and the legislative history it describes as focusing only on such facilities was created before the term "modification" was added to the PSD statutory program. See *Alabama Power*, 636 F.2d at 400 n.47 (legislator's statement that PSD has no effect on "existing sources" absent an "expansion program" was overridden by addition of "modification" to statute). Congress understood that "expansion" and "modification" may mean two different things; had Congress intended PSD to apply only to expanded sources, the definition of "construction" would have referred to "expanded"—as opposed to "modified"—sources. See, *e.g.*, 42 U.S.C. 7475(b) (exempting the "expansion or modification of a major emitting facility" from PSD ambient air quality impact analysis).

Duke also contends (Br. 49) that the purposes of NSPS do not differ from PSD, because NSPS focuses on ambient air quality and was designed "to protect the NAAQS." In enacting the PSD provisions, however, Congress authorized EPA to apply PSD "notwithstanding attainment and maintenance of" the NAAQS. 42 U.S.C. 7470(1). While certainly complementary and sharing

similar goals, the NSPS and PSD programs are not identical, and it is untenable to argue that Congress deprived EPA of its discretion to regulate emissions increases under PSD that are not regulated under NSPS.

In any event, Duke's argument fundamentally distorts the applicable deference analysis. Duke asserts (Br. 49) that its emissions test reasonably "effectuates both the technology and air quality purposes of PSD." That may well be true with respect to power plants in 2006, due to developments such as the creation of more recent programs aimed at reducing their emissions, 70 Fed. Reg. at 61,083-61,088, but it does not follow that it would also have been true in 1980. And even if Duke's preferred approach would have been reasonable in 1980, that would not invalidate EPA's decision to adopt a different, but equally reasonable, approach. *Chevron*, 467 U.S. at 843-845.

In short, faced with an admittedly ambiguous statutory definition, the court of appeals should have deferred to EPA's reasonable conclusion that a project that results in increased total emissions because it leads to increased hours of operation can properly be viewed as a change that "increases the amount of any air pollutant emitted by [the] source." 42 U.S.C. 7411(a)(4). The court of appeals' rejection of that reasonable interpretation was erroneous.

* * * * *

For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

REGULATORY PROVISIONS INVOLVED

1. 40 C.F.R. 51.100 (1987) provides, in pertinent part:

§ 51.100. Definitions.

As used in this part, all terms not defined herein will have the meaning given them in the Act * * *.

* * * * *

2. 40 C.F.R. 51.166 (1987) provides, in pertinent part:

§ 51.166. Prevention of significant deterioration of air quality.

* * * * *

(b) *Definitions.* All state plans shall use the following definitions for the purposes of this section. Deviations from the following wording will be approved only if the state specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definitions below:

* * * * *

(2)(i) "Major modification" means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.

* * * * *

(iii) A physical change or change in the method of operation shall not include:

(*a*) Routine maintenance, repair, and replacement;

* * * * *

(*f*) An increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Subpart I or § 51.166.

* * * * *

(3)(i) "Net emissions increase" means the amount by which the sum of the following exceeds zero:

(*a*) Any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and

(*b*) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

* * * * *

(4) "Potential to emit" means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

* * * * *

(8) Construction means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in actual emissions.

* * * * *

(21)(i) "Actual emissions" means the actual rate of emissions of a pollutant from an emissions unit, as determined in accordance with paragraphs (b)(21)(ii) through (iv) of this section.

(ii) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. The reviewing authority may allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(iii) The reviewing authority may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(iv) For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

* * * * *

(23)(i) "Significant" means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate

Carbon monoxide: 100 tons per year (tpy)

Nitrogen oxides: 40 tpy

Sulfur dioxide: 40 tpy

Particulate matter: 25 tpy of particulate matter emissions.
15 tpy of PM_{10} emissions.

Ozone: 40 tpy of volatile organic compounds

Lead: 0.6 tpy

Asbestos: 0.007 tpy

Beryllium: 0.0004 tpy

Mercury: 0.1 tpy

Vinyl chloride: 1 tpy

Fluorides: 3 tpy

Sulfuric acid mist: 7 tpy

Hydrogen sulfide (H_2S): 10 tpy

Total reduced sulfur (including H_2S): 10 tpy

Reduced sulfur compounds (including H_2S): 10 tpy

* * * * *

(i)(1) The plan shall provide that no major stationary source or other major modification shall begin actual construction unless, as a minimum, requirements equivalent to those in paragraphs (j) through (r) of this section have been met.

* * * * *

3. 40 C.F.R. 52.01 (1987) provides, in pertinent part:

§ 52.01. Definitions

All terms used in this part but not defined herein shall have the meaning given them in the Clear Air Act and in Parts 51 and 60 of this chapter.

* * * * *

(d) The phrases "modification" or "modified source" mean any physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any pollutant for which a national standard has been promulgated under Part 50 of this chapter or which results in the emission of any such pollutant not previously emitted, except that:

(1) Routine maintenance, repair, and replacement shall not be considered a physical change, and

(2) The following shall not be considered a change in the method of operation:

(i) An increase in the production rate, if such increase does not exceed the operating design capacity of the source;

(ii) An increase in the hours of operation;

(iii) Use of an alternative fuel or raw material, if prior to the effective date of a paragraph in this part which imposes conditions on or limits modifications, the source is designed to accommodate such alternative use.

4. 40 C.F.R. 52.21(a) (1987) provides, in pertinent part:

(a) *Plan disapproval.* The provisions of this section are applicable to any State implementation plan which has been disapproved with respect to prevention of significant

deterioration of air quality in any portion of any State where the existing air quality is better than the national ambient air quality standards.

(b) *Definitions.* For the purposes of this section:

* * * * *

(2)(i) "Major modification" means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.

* * * * *

5. 40 C.F.R. 60.2 (1987) provides, in pertinent part:

§ 60.2. Definitions.

The terms used in this part are defined in the Act or in this section as follows:

* * * * *

"Modification" means any physical change in, or change in the method of operation of, an existing facility which increases the amount of any air pollutant (to which a standard applies) emitted into the atmosphere by that facility or which results in the emission of any air pollutant (to which a standard applies) into the atmosphere not previously emitted.

* * * * *

6. 40 C.F.R. 51.166(b) (1993) provides, in pertinent part:

§ 51.166. Prevention of significant deterioration of air quality.

* * * * *

(b) *Definitions.* All state plans shall use the following definitions for the purposes of this section. Deviations from the following wording will be approved only if the state

specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definitions below:

* * * * *

(2)(i) *Major modification* means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.

* * * * *

(iii) A physical change or change in the method of operation shall not include:

* * * * *

(*f*) An increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR subpart I or § 51.166.

* * * * *

(3)(i) *Net emissions increase* means the amount by which the sum of the following exceeds zero:

(*a*) Any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and

(*b*) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

* * * * *

(4) *Potential to emit* means the maximum capacity of a stationary source to emit a pollutant under its physical and

operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

* * * * *

(21)(i) *Actual emissions* means the actual rate of emissions of a pollutant from an emissions unit, as determined in accordance with paragraphs (b)(21)(ii) through (iv) of this section.

(ii) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. The reviewing authority may allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(iii) The reviewing authority may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(iv) For any emissions unit (other than an electric utility steam generating unit specified in paragraph (b)(21)(v) of this section) which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(v) For an electric utility steam generating unit (other than a new unit or the replacement of an existing unit) actual emissions of the unit following the physical or operational change shall equal the representative actual annual emissions of the unit following the physical or operational change, provided the source owner or operator maintains and submits to the reviewing authority, on an annual basis for a period of 5 years from the date the unit resumes regular operation, information demonstrating that the physical or operational change did not result in an emissions increase. A longer period, not to exceed 10 years, may be required by the reviewing authority if it determines such a period to be more representative of normal source post-change operations.

* * * * *

(23)(i) *Significant* means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate

Carbon monoxide: 100 tons per year (tpy)

Nitrogen oxides: 40 tpy

Sulfur dioxide: 40 tpy

Particulate matter: 25 tpy of particulate matter emissions.
15 tpy of PM_{10} emissions.

Ozone: 40 tpy of volatile organic compounds

Lead: 0.6 tpy

Asbestos: 0.007 tpy

Beryllium: 0.0004 tpy

Mercury: 0.1 tpy

Vinyl chloride: 1 tpy

Fluorides: 3 tpy

Sulfuric acid mist: 7 tpy

Hydrogen sulfide (H_2S): 10 tpy

Total reduced sulfur (including H_2S): 10 tpy

Reduced sulfur compounds (including H_2S): 10 tpy

Municipal waste combustor organics (measured as total tetra-through octa-chlorinated dibenzo-p-dioxins and dibenzofurans): 3.2×10^{-6} megagrams per year (3.5×10^{-6} tons per year)
Municipal waste combustor metals (measured as articulate matter): 14 megagrams per year (15 tons per year) Municipal waste combustor acid gases (measured as sulfur dioxide and hydrogen chloride): 36 megagrams per year (40 tons per year)

* * * * *

(32) *Representative actual annual emissions* means the average rate, in tons per year, at which the source is projected to emit a pollutant for the two-year period after a physical change or change in the method of operation of a unit, (or a different consecutive two-year period within 10 years after that change, where the reviewing authority determines that such period is more representative of normal source operations), considering the effect any such change will have on increasing or decreasing the hourly emissions rate and on projected capacity utilization. In projecting future emissions the reviewing authority shall:

(i) Consider all relevant information, including but not limited to, historical operational data, the company's own representations, filings with the State or Federal regulatory

authorities, and compliance plans under title IV of the Clean Air Act; and

(ii) Exclude, in calculating any increase in emissions that results from the particular physical change or change in the method of operation at an electric utility steam generating unit, that portion of the unit's emissions following the change that could have been accommodated during the representative baseline period and is attributable to an increase in projected capacity utilization at the unit that is unrelated to the particular change, including any increased utilization due to the rate of electricity demand growth for the utility system as a whole.

7. 40 C.F.R. 60.14 (1993) provides, in pertinent part:

§ 60.14. Modification.

(a) Except as provided under paragraphs (e) and (f) of this section, any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies shall be considered a modification within the meaning of section 111 of the Act. Upon modification, an existing facility shall become an affected facility for each pollutant to which a standard applies and for which there is an increase in the emission rate to the atmosphere.

(b) Emission rate shall be expressed as kg/hr of any pollutant discharged into the atmosphere for which a standard is applicable. * * *

* * * * *

(e) The following shall not, by themselves, be considered modifications under this part:

(1) Maintenance, repair, and replacement which the Administrator determines to be routine for a source

category, subject to the provisions of paragraph (c) of this section and § 60.15.

(2) An increase in production rate of an existing facility, if that increase can be accomplished without a capital expenditure on that facility.

(3) An increase in the hours of operation.

(4) Use of an alternative fuel or raw material if, prior to the date any standard under this part becomes applicable to that source type, as provided by § 60.1, the existing facility was designed to accommodate that alternative use. A facility shall be considered to be designed to accommodate an alternative fuel or raw material if that use could be accomplished under the facility's construction specifications as amended prior to the change. Conversion to coal required for energy considerations, as specified in section 111(a)(8) of the Act, shall not be considered a modification.

(5) The addition or use of any system or device whose primary function is the reduction of air pollutants, except when an emission control system is removed or is replaced by a system which the Administrator determines to be less environmentally beneficial.

(6) The relocation or change in ownership of an existing facility.

* * * * *

(h) No physical change, or change in the method of operation, at an existing electric utility steam generating unit shall be treated as a modification for the purposes of this section provided that such change does not increase the maximum hourly emissions of any pollutant regulated under this section above the maximum hourly emissions achievable at that unit during the 5 years prior to the change.

* * * * *

8. 40 C.F.R. 52.21 (2003) provides, in pertinent part:

§ 52.21. Prevention of significant deterioration of air quality.

(a)(1) *Plan disapproval.* The provisions of this section are applicable to any State implementation plan which has been disapproved with respect to prevention of significant deterioration of air quality in any portion of any State where the existing air quality is better than the national ambient air quality standards. Specific disapprovals are listed where applicable, in subparts B through DDD of this part. The provisions of this section have been incorporated by reference into the applicable implementation plans for various States, as provided in subparts B through DDD of this part.

Where this section is so incorporated, the provisions shall also be applicable to all lands owned by the Federal Government and Indian Reservations located in such State. No disapproval with respect to a State's failure to prevent significant deterioration of air quality shall invalidate or otherwise affect the obligations of States, emission sources, or other persons with respect to all portions of plans approved or promulgated under this part.

(2) *Applicability procedures.* (i) The requirements of this section apply to the construction of any new major stationary source (as defined in paragraph (b)(1) of this section) or any project at an existing major stationary source in an area designated as attainment or unclassifiable under sections 107(d)(1)(A)(ii) or (iii) of the Act.

(ii) The requirements of paragraphs (j) through (r) of this section apply to the construction of any new major stationary source or the major modification of any existing major stationary source, except as this section otherwise provides.

(iii) No new major stationary source or major modification to which the requirements of paragraphs (j) through (r)(5) of this section apply shall begin actual construction without a permit that states that the major stationary source or major modification will meet those requirements. The Administrator has authority to issue any such permit.

(iv) The requirements of the program will be applied in accordance with the principles set out in paragraphs (a)(2)(iv)(a) through (f) of this section.

(*a*) Except as otherwise provided in paragraphs (a)(2)(v) and (vi) of this section, and consistent with the definition of major modification contained in paragraph (b)(2) of this section, a project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases—a significant emissions increase (as defined in paragraph (b)(40) of this section), and a significant net emissions increase (as defined in paragraphs (b)(3) and (b)(23) of this section). The project is not a major modification if it does not cause a significant emissions increase. If the project causes a significant emissions increase, then the project is a major modification only if it also results in a significant net emissions increase.

(*b*) The procedure for calculating (before beginning actual construction) whether a significant emissions increase (i.e., the first step of the process) will occur depends upon the type of emissions units being modified, according to paragraphs (a)(2)(iv)(*c*) through (*f*) of this section. The procedure for calculating (before beginning actual construction) whether a significant net emissions increase will occur at the major stationary source (*i.e.*, the second step of the process) is contained in the definition in paragraph (b)(3) of this section. Regardless of any such preconstruction projections, a major

modification results if the project causes a significant emissions increase and a significant net emissions increase.

(*c*) *Actual-to-projected-actual applicability test for projects that only involve existing emissions units.* A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the projected actual emissions (as defined in paragraph (b)(41) of this section) and the baseline actual emissions (as defined in paragraphs (b)(48)(i) and (ii) of this section), for each existing emissions unit, equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(*d*) *Actual-to-potential test for projects that only involve construction of a new emissions unit(s).* A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the difference between the potential to emit (as defined in paragraph (b)(4) of this section) from each new emissions unit following completion of the project and the baseline actual emissions (as defined in paragraph (b)(48)(iii) of this section) of these units before the project equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of this section).

(*e*) *Emission test for projects that involve Clean Units.* For a project that will be constructed and operated at a Clean Unit without causing the emissions unit to lose its Clean Unit designation, no emissions increase is deemed to occur.

(*f*) *Hybrid test for projects that involve multiple types of emissions units.* A significant emissions increase of a regulated NSR pollutant is projected to occur if the sum of the emissions increases for each emissions unit, using the method specified in paragraphs (a)(2)(iv)(*c*) through (*e*) of this section as applicable with respect to each emissions unit, for each type of emissions unit equals or exceeds the significant amount for that pollutant (as defined in paragraph (b)(23) of

this section). For example, if a project involves both an existing emissions unit and a Clean Unit, the projected increase is determined by summing the values determined using the method specified in paragraph (a)(2)(iv)(*c*) of this section for the existing unit and using the method specified in paragraph (a)(2)(iv)(*e*) of this section for the Clean Unit.

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In The
Supreme Court of the United States

ENVIRONMENTAL DEFENSE, et al.,

Petitioners,

v.

DUKE ENERGY CORPORATION, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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INTRODUCTION

Making no effort to defend the Fourth Circuit's reasoning, Duke seeks to defend its result by urging that EPA's 1980 PSD regulations "compel the conclusion that a PSD 'major modification' first requires an NSPS 'modification' – a change that causes an increase in a unit's hourly emissions rate." Br. 33. Duke advances this theory both as a purported basis to avoid Section 307(b), and a substantive argument that the agency's reading of its rules is impermissible.

This makes for painful reading: In fact, the 1980 regulations and their preamble make *no mention whatsoever* of the NSPS maximum hourly rate test Duke now asserts to be a prerequisite for every PSD "major modification." Instead, they set forth in considerable detail a PSD applicability test triggered by increases in "actual" emissions measured in "tons per year," regardless of whether the same project would satisfy the NSPS regulatory test. Duke not only "could have" challenged these patent features of the PSD rules, it did: Duke was party to D.C. Circuit proceedings that began with Duke and others (in 1982) importuning EPA to add an hourly-rate increase requirement to the PSD regulations, and ended with the court rejecting Duke's arguments that the Act mandates an hourly rate test for PSD. *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005). Duke's identical statutory arguments here are "not subject to review" in this "enforcement action," 42 U.S.C. 7607(b). (They are also meritless.)

Duke's merits brief unveils a *deus ex machina* – two "general" regulatory provisions now said to import an hourly rate increase requirement into PSD. See Br. 28 (1980 "rules as promulgated clearly provided that a PSD 'major modification' first requires an NSPS 'modification.'") (citing 40 C.F.R. 51.100, 52.01(d)). As with many 13th-hour arguments, it was for good reason Duke did not cite either provision in its 101-page brief below (or its opposition to certiorari). Neither even arguably "provides" – "clearly" or

otherwise – that an NSPS hourly rate increase is a prerequisite for PSD applicability.

I. DUKE COULD HAVE OBTAINED D.C. CIRCUIT REVIEW OF ANY CLAIM THAT EPA HAD TO USE AN HOURLY RATE TEST FOR PSD

As our opening brief explained, the Fourth Circuit's decision represents a flagrant violation of Section 307(b), the provision allocating judicial authority over CAA rulemakings. Although Duke protests (Br. 29) that this provision does not disable a court in an enforcement proceeding from rejecting EPA's interpretation of a regulation, that is not what happened below: the Fourth Circuit did not *interpret* the regulations, deeming their text "largely irrelevant." Pet. App. 11a n.3. Its decision rested on a *statutory* ruling that vitiated nationally applicable rules. As we explained, the vice of that conclusion (beyond being wrong about the CAA's substance) is not simply that the question was statutory, but that it was a statutory objection that could have been – and was, in fact – presented to the D.C. Circuit. Making no effort to defend the Fourth Circuit's overstep, Duke even denigrates critiques of the court's reasoning as attacks on a "straw man" that does not reflect "Duke's position." Br. 31.

Duke calls EPA's view that the 1980 PSD regulations do not require an increase in hourly rates an "enforcement interpretation" (Br. 25) that Duke "could not have challenged" (Br. 28) in the D.C. Circuit.[1] But a glance at the

[1] It is not true that the United States raised Section 307(b) "[o]nly after the Fourth Circuit signaled in a supplemental briefing order that it was not accepting EPA's position[.]" Duke Br. 26-27. Its opening brief (US CA4 Br. 23) pointed to the D.C. Circuit's "exclusive jurisdiction," and when, at oral argument, the panel questioned the regulations' consonance with the CAA, counsel for the United States observed that "reject[ing] portions of the PSD regulations" was "something only the D.C. Circuit has jurisdiction to do" under "Section 7607" of the CAA. CA4 Arg. Tr. 15. When one judge responded, "[t]his would not be that. This would be statutory – this is Congress telling us that the definition must be the same," counsel explained that "the proper vehicle for making that claim

plain language of the regulations reveals the utter insubstantiality of this plea. The 1980 PSD regulations contain no requirement that there be an increase in a source's hourly rate for PSD to apply. To the contrary, they direct, in specific and technical detail, that emissions be measured in "tons per year" of "actual" emissions, 40 C.F.R. 51.166(b)(3), (21). EPA's adoption of this "actual, annual" emissions increase test in 1980 was "action" "of which review could have been obtained" in the D.C. Circuit. See 42 U.S.C. 7607(b), (d). As the Seventh Circuit recently explained in rejecting a challenge to the 1980 PSD regulations advanced by Duke's affiliate:

> Cinergy's principal argument * * * is that Congress required that the regulation define "modification" as a change in the hourly emission rate. Since the [1980 PSD] regulation does not define it so, this seems an attack on the validity of the regulation rather than an argument about its meaning, and [pursuant to CAA Section 307(b)] issues of validity * * * are beyond the jurisdiction of a regional circuit to resolve.

United States v. Cinergy, 458 F.3d 705, 709 (2006). That it is necessary here, as in *Cinergy*, to look preliminarily at the regulations to see whether a party's claim "could have been obtained" in the D.C. Circuit, is *not*, as Duke seeks to argue (Br. 30-31), reason to ignore Section 307(b) and proceed to the merits of challenges that could have been (and here, were) presented to that court.

Here, Duke could not have been lulled by the regulatory text. A requirement that no project can trigger PSD unless it first triggers the NSPS regulatory test would have been an enormously important feature of the 1980 rules. Yet the comprehensive regulatory text and preamble contain not even

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would be in a challenge to the regulations which supposedly violated that statutory mandate." *Id.* The court ordered supplemental briefing on the statutory issue three months later. See JA 9; Pet. App. 21a.

a "mousehole" for such a brontosaurian proviso. *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001). The PSD rules provide elaborate and specific instructions on how to determine whether a physical or operational change has caused a PSD-triggering emissions increase. 40 C.F.R. 51.166(b)(3), (21) (1987). See Petr. Br. 10-11. When, in those regulations, EPA intended to reference NSPS standards, it did so in clear terms.[2] The PSD rules make no mention of the detailed regulatory test for NSPS modifications in 40 C.F.R. 60.14(b). Unsurprisingly, the four appellate panels to have examined the 1980 regulations' text, cf. Pet. App. 11a n.3, have readily concluded that the test for PSD applicability – turning on increases in actual, annual emissions – differs "fundamentally" from the NSPS hourly rate test.[3]

The 1980 preamble highlighted that EPA had "change[d]" the PSD applicability standards set out in the 1979 proposed rule, 45 Fed. Reg. 52676, 52680 (Aug. 7, 1980), based on the D.C. Circuit's reading of the statute in *Alabama Power v. EPA*, 636 F.2d 323, 399-400 (1979), and EPA's own scrutiny of the "language of the statutory definition," which embraces "any" physical or operational "change" that "increases the amount of any air pollutant emitted by such source." 45 Fed. Reg. at 52700 (emphasis EPA's). The 1980 PSD rules, in turn, define a "major modification" as a (1) "physical change in or change in

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[2] See, *e.g.*, 40 C.F.R. 51.166(b)(12) (BACT under PSD must comply with "any applicable standard under 40 C.F.R. 60 and 61"); 40 C.F.R. 51.166(b)(16)(i) ("allowable emissions" for PSD must be at least as stringent as "standards as set forth in 40 CFR Parts 60 and 61"); see also *id.* 51.166(b)(17), 51.166(j)(1), 51.18(j)(1)(xvii).

[3] *Wis. Elec. Power Co. v. Reilly*, 893 F.2d 901, 913, 915 (7th Cir. 1990) ("*WEPCo.*") (NSPS and PSD rules measure emissions increases in "fundamentally distinct manner," namely, hourly rates versus actual, annual emissions). See *Cinergy*, 458 F.3d at 708 ("the natural reading of the regulation is that any physical change or change in operating methods that increases annual emissions is covered"); *New York*, 413 F.3d at 18; *Puerto Rican Cement v. EPA*, 889 F.2d 292, 297 (1st Cir. 1989).

method of operation" at a source (2) that "results in a significant net emissions increase," 40 C.F.R. 51.166(b)(2)(i), and define those constituent phrases in actual annual terms, *id.* at (b)(3)(i) (net emissions increase defined as "actual emissions"), (b)(21)(i) ("actual emissions" from unit specified as "rate" in "tons per year").

The 1980 preamble is likewise bereft of any support for Duke's assertion that "a PSD 'major modification' first requires an NSPS 'modification.'" Br. 28 (citing 40 C.F.R. 51.100, 52.01(d), neither of which, as explained below, "provided" anything of the kind). To the contrary, the preamble explains that, once a physical or operational change is identified, "[t]he first step in determining whether a 'net emissions increase' would occur is to determine whether the physical or operational change in question would itself result in an increase in 'actual emissions.'" 45 Fed. Reg. at 52698; see *id.* at 52705 (EPA examples discussed in U.S. Br. 23). The actual emissions "rate," as explained, is expressed in "tons per year." 40 C.F.R. 51.166(b)(21)(i).

In 1982, a group of D.C. Circuit petitioners, including Duke, see Petr. Br. 12-13; U.S. Br. 8, 32-33, entered into a settlement whereby EPA agreed to propose for comment a change in the 1980 regulations' definition of "major modification," removing the references to "actual" emissions "wherever it occurs in paragraph (b)(3)" (the definition of "net emissions increase," now 40 C.F.R. 51.166(b)(3)), and to add *new* regulatory language expressly providing that PSD would not apply absent an increase in hourly emissions rates. See Petr. Br. 13. Settlement Agreement, D.C. Cir. No. 79-1112, Exh. B, Sec. A, ¶ 1 (1982). This change would have made an increase in hourly emissions rates a *sine qua non* for PSD applicability – just what Duke now argues, without colorable textual basis, the 1980 regulations themselves already did. See, *e.g.*, Duke Br. 33.[4]

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[4] See 61 Fed. Reg. 38249, 38269 (July 23, 1996) (proposed language would have "eliminate[d] a source's level of operations as a factor when

Duke actually obtained D.C. Circuit review of the "divergence" between the 1980 PSD regulations from the NSPS regulatory test, and the D.C. Circuit rejected its arguments. See *New York*, 413 F.3d at 20.[5] Attempting to downplay that review, Duke asserts that *New York* "principally involved a challenge to the 2002 rules," and that the D.C. Circuit merely disagreed "that Congress adopted NSPS rules *wholesale* into PSD." Br. 32 (citing 413 F.3d at 19-20) (emphasis added). But the court rejected Duke's challenge to the "1980 *and* 2002 rules," specifically, the claim "that modification must have the same regulatory

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determining whether a proposed change will result in an increase" and to require regulators to "completely disregard[]" post-change utilization). See also 67 Fed. Reg. 80186, 80205 (Dec. 31, 2002); 70 Fed. Reg. 61081, 61098 (Oct. 20, 2005) (referring to settlement test as "NSPS-like"). Duke ignores the settlement's terms, failing even to note (Br. 11) it was a party. Duke does, however, try to explain away – as having "nothing to do with Duke's position here" (Br. 11) – the D.C. Circuit brief filed in February 1981 by General Motors *et al.* (Petr. Br. 12), which complained that, under EPA's 1980 rules, PSD could apply "even though the source's net *capacity* to emit remains constant or declines." Br. Ind. Pet'rs On Actual Emissions 5-6 (No. 79-1112; filed Feb. 12, 1981) ("GM Brief") (emphasis added). Yet Duke's central position is that PSD should only apply where there is an increase in "basic emissions capacity" (Duke Br. 2), or a facility's "design emitting capacity" (Duke Br. Opp'n 4). Seeking to blur the incompatibility between this position and the D.C. Circuit's rulings that PSD turns on increases in "actual" emissions, *e.g.*, *New York*, 413 F.3d at 38-40, Duke unveils an oxymoronic new phrase, "actual emissions capacity." Br. 22, 32 n.13; see also Br. 5 ("actual emissions capabilities"). We have requested leave under Rule 32.3 to lodge the settlement agreement and GM Brief with the Clerk.

[5] Duke's arguments here are eerily similar to those made before the D.C. Circuit. Compare, *e.g.*, Joint Reply Br. Ind. Pet'rs 6 (No. 02-1387; filed Sept. 20, 2004) ("in adopting the NSPS and 1974 PSD meaning and usage of modification into NSR, Congress selectively modified certain of the rules while adopting others (including the well-established definition of 'modification') without change. Such selectivity is strong evidence of Congress's intent to incorporate in the statute those regulatory provisions that it did not specifically change. Cf. *Lorillard v. Pons*, 43 U.S. 575, 582 (1978)") with Duke Br. 44.

meaning for NSR as prevailed for NSPS in 1977." 413 F.3d at 19-20.[6] As the D.C. Circuit itself has explained, *New York* "rejected industry's contention that Congress ratified the [NSPS] regulations on 'modification' in the 1977 amendments * * * * [and] their position that 'modifications' require an increase in maximum emissions rates[.]" *New York v. EPA*, 443 F.3d 880, 889 (D.C. Cir. 2006) (*New York* II) (citing 413 F.3d at 19-20, 40 and 431 F.3d 801, 802-803 (2005) (Williams, J., conc. den. reh'g. en banc)). No party petitioned for certiorari in *New York*, though the time to file elapsed months after the petition in this case was filed.

Nor can Duke escape from *New York* by pointing to (Br. 32-33) the D.C. Circuit's refusal to address, as unripe, industry's challenge to an "allegedly new interpretation of the 1980 rule contained in the preamble to the 2002 rule," 413 F.3d at 20. See also *id.* at 21 (noting that preamble language "appears to be – as EPA claims – no more than a short-hand reference to the 1980 rule, not a formal interpretation").[7] The

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[6] Duke and other petitioners also urged that the 1980 final rule should be vacated as an impermissible departure from the 1979 proposal, which they read to restrict PSD to changes that increased units' capacity to emit. Joint Br. Ind. Pet'rs 35-37 (D.C. Cir. No. 02-1387; filed May 11, 2004).

[7] Duke's repeated assertions before this Court that EPA's position is an "enforcement interpretation" (e.g., Br. 22, 24, 25, 27, 33, 41, 46) – arising from an "abrupt reversal of position" by EPA occurring "in November 1999" (Br. 16) – are inconsistent with its own D.C. Circuit submissions: "*Beginning in the late 1980s*, EPA, without even acknowledging its contemporaneous interpretation of the 1980 NSR rules, attempted to rewrite the rules by reinterpreting them as having repealed the first step of the emissions increase test—*i.e.*, the requirement that there be NSPS modification activity." Joint Br. Ind. Pet'rs 16 (D.C. Cir. No. 02-1387; filed May 11, 2004) (emphasis added); see *New York*, 413 F.3d at 15 (discussing *WEPCo.*, *Puerto Rican Cement*, and 1992 preamble, 57 Fed. Reg. 32314, 32328 (July 21, 1992)). Similarly, the record reflects that since at least 1990, Duke and the Utility Air Resources Group (of which Duke is a member and with whom it shares counsel) have known that increased hours of operation, or "utilization," could trigger PSD even if hourly rates do not increase. JA 243, 272, 276, 380, 496.

D.C. Circuit did not regard as unripe challenges to *the 1980 regulations themselves* – including their "divergence" (*id.* at 20) from the NSPS hourly rate regulation; it rejected those challenges on the merits, *id.* at 18-20. If there were others the D.C. Circuit did "not resolve" (Duke Br. 32), it was because Duke did not present them, see 413 F.3d at 20. Any CAA or APA-style challenge to the 1980 regulations' patent failure to impose an NSPS-like hourly rate "trigger" for PSD would have been cognizable by petition for review immediately upon promulgation, and is barred in an enforcement action. 42 U.S.C. 7607(b)(2). If "fundamental fairness" (Duke Br. 29) speaks to these circumstances, it calls for enforcement of that limitation, which governs, and protects, the large range of interests affected by CAA rulemakings. See, *e.g.*, Br. of Amici Curiae New Jersey *et al.* 5-20; Br. of Amici Curiae STAPPA *et al.* 15-18; Br. of Former EPA Admin'rs 1-13.[8]

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[8] Duke's narrative of regulator acquiescence rings decidedly hollow. That a letter from Duke claiming its units would be in "extended cold shutdown" with "minimal expenditures" (JA 187), prompted agreement from state environmental officials that PSD did not apply (Duke Br. 18), is meaningless given the projects actually Duke undertook – work more accurately explained to utility regulators from whom Duke sought increased rates. See Petr. Br. 19-20 (quoting Duke's statements of need for "total rehabilitation" of "geriatric" units "too dangerous to operate" and otherwise due to be "retired and scrapped"). Also unavailing are routine field inspection reports (Duke Br. 18): A state inspector explained that PSD "determinations are not made in the field" (JA 363) and require testing and analysis such that "just from the inspection and looking at the boiler, you couldn't say it is subject to PSD or not." JA 347. See also JA 313, 323, 333. Despite the scale of Duke's Plant Modernization Program, it never sought an applicability determination from EPA. Cf. *Harrison v. PPG Industries, Inc.*, 446 U.S. 578 (1980); *WEPCo*, 893 F.2d at 913; *Puerto Rican Cement*, 889 F.2d at 297-298; *Potomac Elec. Power Co. v. EPA*, 650 F.2d 509 (4th Cir. 1981); *Hawaiian Elec. Co. v. EPA*, 723 F.2d 1440 (9th Cir. 1984). To the extent claims of agency acquiescence or prejudicial delay in initiating enforcement could have any legal relevance here, they would not bear on the validity of the EPA's regulations or interpretation, but on affirmative defenses such as estoppel or laches—defenses Duke asserted below. But see *Office of Personnel Management v. Richmond*, 496 U.S. 414, 419-24 (1990).

II. DUKE'S NEW READING OF THE REGULATIONS IS OBVIOUSLY WRONG

Duke contends "that an NSPS 'modification' is required before a [PSD] 'major modification' analysis can occur," so that PSD cannot apply unless "an increase in a unit's maximum achievable hourly emissions rate occurs." Br. 32 (citing 40 C.F.R. 60.14, the NSPS regulation). Although the PSD regulations' highly specific instructions on how to measure emissions "increases" for PSD purposes say nothing of an hourly rate "trigger," Duke claims it materializes by operation of two "general" regulatory provisions, which are said to make satisfaction of the NSPS hourly rate increase test a prerequisite for any PSD "major modification." See Duke Br. 2, 10, 28, 32, 34 (citing 40 C.F.R. 51.100, 52.01(d)).

Duke did not present this account of the regulations in its briefs in the Fourth Circuit or its opposition to certiorari. In neither place did Duke *cite* either of the regulatory provisions now assigned the monumental role of importing the NSPS hourly rate standard into the PSD regime.[9] To the contrary, its opposition (correctly) referred to "major modification," 40 C.F.R. 51.166(b)(2), as "the definition of 'modification' for PSD." Duke Cert. Opp. 7-8. See *Baldwin v. Reese*, 541 U.S. 27, 34 (2004) (waiver under Sup. Ct. Rule 15.2); *Aetna Health Inc. v. Davila*, 542 U.S. 200, 212 n.2 (2004) (same).

This late-breaking regulatory argument is, in any event, completely disconnected from the 1980 PSD regulations, which nowhere incorporate – as the "trigger" (see Duke Br. 32) for a PSD modification, or for any other purpose – the NSPS regulations' hourly rate provisions in Part 60.14. Rather, the definition of "major modification" in 40 C.F.R. 51.166(b) sets forth a free-standing and complete standard for judging whether activity is subject to PSD, and the

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[9] In *Cinergy*, unlike this case, the appellant did argue that a PSD "major modification" must, by operation of 40 C.F.R. 52.01(d), first constitute a NSPS "modification" – this was among the arguments the Seventh Circuit dismissed as "makeweights." *Cinergy*, 458 F.3d at 711. See Duke Br. 19.

regulations carefully define each of the terms used therein. The definition prescribes what a PSD "'[m]ajor modification' *means*," *id.* 51.166(b)(2)(i) (emphasis added); activities that satisfy the criteria therein are subject to PSD, *id.* 51.166(i)(1).

The term "major modification" was introduced in the 1977 PSD regulations to correspond to the PSD regulatory term "major source," and EPA's initial regulations required that emissions increases from a change be large enough independently to reach the statutory thresholds for "major emitting sources." See 42 Fed. Reg. 57459, 57480 (Nov. 3, 1977). After *Alabama Power* disapproved this "regulatory definition of modification," 636 F.2d at 399, EPA retained "major modification" as the PSD implementation of the CAA term "modification" in the revised rules. See, *e.g.*, 45 Fed. Reg. at 52704 (providing examples of "the way in which *the definition of modification works*") (emphasis added); *id.* at 52705 (examples of changes that "qualify as modifications").[10]

The 1980 regulations define "major modification" in high-resolution detail, leaving no room for Duke's subliminal NSPS trigger. According to Duke, before a "major modification" can occur, "first" a "unit's" hourly rate must increase. Br. 33. But the 1980 regulations explicitly define "actual emissions" at the "unit" level in "tons per year," 40 C.F.R. 51.166(b)(21)(i); see 45 Fed. Reg. at 52698 ("the first step" is to "determine whether the physical or operational change in question would itself' increase annual emissions). At the next stage, the regulator must sum "*any increase* in actual emissions from a particular physical change" with "*any other* increases and decreases in actual emissions at the source." 40 C.F.R. 51.166(b)(3)(i)(*a*), (*b*) (emphases added).

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[10] EPA did not use Duke's allegedly NSPS-referring definitional structure for PSD prior to 1980, either. See, *e.g.*, 44 Fed. Reg. 51924, 51948 (Sept. 5, 1979) (proposed regulations, describing "major modification" as "the definition of 'modification' * * * when used in the Act in reference to a major stationary source").

Thus, a change that causes a significant increase in a unit's actual, annual emissions qualifies as a "major modification" even if there is no decrease to be "netted" against it, and even if there is no increase in hourly rates. An NSPS "modification" is nowhere made an interceding "first step" for PSD applicability.[11]

Duke's account is also inconsistent with the 1980 preamble's explanation of *why* the "actual emissions" standard supplanted the "potential emissions rate" test proposed in 1979. Both the *Alabama Power* court, and EPA itself, emphasized the broad *statutory* definition of "modification" – and its interplay with the express statutory requirements for PSD – in concluding that PSD must capture "actual" emissions increases. See 636 F.2d at 400; 45 Fed. Reg. at 52700; see also *id.* at 52718 ("Use of actual emissions for increment consumption is consistent with using an actual emissions baseline for defining a major modification."); *id.* (linking choice of "actual emissions" to effort to "reflect actual air quality" in area).

Against the precision of the 1980 regulations, the two "general" provisions Duke cites as the basis for its argument that the PSD regulations incorporate the NSPS hourly rate test, 40 C.F.R. 51.100 and 52.01(d), do very little. Section 51.100 provides that "[a]s used in this Part, all terms not defined herein will have the meaning given them in the Act." This provision applies only to *undefined* terms, and the specific and detailed "major modification" definition in 51.166(b)(2)(i) *is* the regulatory definition of the statutory

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[11] The January 1981 Reich memorandum (cited in Duke Br. 11-12, 28) makes this very point. Reich explained that the "*first*" step in the PSD inquiry is "to determine if there will be a significant net emissions increase from the modification itself" with the emissions "rates" expressed as tons per year. JA 36. Reich noted that this understanding would be published in the Federal Register (JA 36), and it was: 48 Fed. Reg. 38742, 38746 (Aug. 23, 1983) ("first step" is to sum emissions from change at unit); see *id.* n.14 ("tpy" emissions at all steps, including for units).

term "modification" for PSD purposes – as has been recognized by EPA, *supra*, p. 10; by courts both before and after the 1980 rulemaking, see *Alabama Power*, 636 F.2d at 399; *New York*, 413 F.3d at 20; and (until its merits brief) by Duke itself, see Duke Cert. Opp. 7-8. Ever since the term "major modification" was introduced for PSD in 1977, EPA has invariably treated it as the operative NSR regulatory definition of the statutory term "modification," and there is no sign, anywhere, that EPA understood or intended that detailed regulatory definition to be dramatically qualified by Section 51.100's bare reference to the statute.[12]

Equally unavailing is Duke's reliance on Section 52.01(d), which, uncited in the Fourth Circuit or in Duke's opposition to our petition, now rates a "passim," Duke Br. x. Promulgated for the 1974 administrative PSD program, Section 52.01(d) provides that "the phrases modification or modified source mean any physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any pollutant * * * *" Section 52.01(d) applies only to "this part" – Part 52 – and, as Duke has recognized, this case is governed by Part 51, establishing the PSD requirements for state plans. See Duke Cert. Opp. 7 n.15 (state rules "are identical to the federal 1980 PSD rules, 40 C.F.R. § 51.166 (1987)"). The Part 51 regulations instruct that "All state plans shall use *the following definitions* for purposes of this section," and that states may use different definitions only if they are "at least as stringent, in all respects as the corresponding definitions below." 40 C.F.R. 51.166(b)

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[12] Even if it applied, 40 C.F.R. 51.100 would get Duke nowhere. Inserting the CAA 111(a)(4) language into the regulatory definition of "major modification," would still predicate PSD applicability (albeit in oddly prolix fashion) on a "net emission increase," measured in "tons per year" of "actual emissions." See 40 C.F.R. 51.166(b)(3), (b)(21). Nor (obviously) does the inclusive definition of "construction" in the PSD regulations, *id.* 51.166(b)(8) (cited in Duke Br. 23, 33, 35, but *also* not cited below) establish an hourly rate-increase precondition for PSD.

(emphasis added).[13]

In any event, by its terms, Section 52.01(d) does not purport to mandate the use of the NSPS (or any other) "hourly rate" test. An "emission rate" can be measured in hourly, daily, annual, or other terms – and the 1980 regulations explicitly measure emissions "rates" in "tons per year." See 40 C.F.R. 51.166(b)(21)(i); (b)(23)(i); see also 38 Fed. Reg. 18986, 18996 (July 16, 1973) (proposed PSD rules describing "rate" in "*annual* * * * tons" of pollution) (emphasis added).[14] The reference to "rate" in Section 52.01(d) does not vary the specific and detailed methodology for identifying PSD emissions increases set forth in 40 C.F.R. 51.166(b).

Duke also invokes the limited exclusion for "[a]n increase in the hours of operation or in the production rate." 40 C.F.R. 51.166(b)(2)(iii)(*f*). But, as its plain language makes clear, this provision addresses what constitutes a "physical change" or "change in the method of operation," not how emissions from such a change should be measured. See, *e.g.*, Petr. Br. 36-37; 45 Fed. Reg. at 52704; *WEPCo.*, 893 F.2d at 916 n.11; *Puerto Rican Cement*, 889 F.2d at 298; 45 Fed. Reg. at 52698 (under regulations, physical and operational "changes" "do not encompass certain specific types of events"). When such a "change" *is* present – in an extensive plant "modernization," for example – the regulations *require* that "[a]ny increase in

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[13] *Alabama Power* specifically described Section 52.01(d) as having been "superseded," 636 F.2d at 348 n.24, and EPA never referenced it in the 1980 preamble. See 45 Fed. Reg. 52686 (1980 regulations would in time "displace the old" Part 52 regulations "entirely"). It is quite implausible that EPA – crafting new regulations in direct response to *Alabama Power* – would have *silently* assigned this provision an enormously important role in determining PSD coverage.

[14] When EPA first promulgated Section 52.01(d) in 1974, the NSPS regulations did not provide for an hourly rate test. See 39 Fed. Reg. 42,510, 42,513 (Dec. 5, 1974) (explaining in the PSD rule preamble that the Administrator was still evaluating how to define "modification" for NSPS purposes); 39 Fed. Reg. 36946, 36947 (Oct. 15, 1974) (soliciting comment on the unit of measurement for emissions increases under NSPS, and including "year[ly]" increases as an option).

actual emissions from a particular physical change or change in the method of operation" be counted, in "tons per year." 40 C.F.R. 51.166(b)(3)(i)(*a*), (b)(21)(*i*).

Duke pleads that "changes in hours operation, standing alone, are not changes in the 'method of operation,'" so "the 'hours of operation' exclusion must do more." Br. 39-40. But this overlooks the breadth of the *statutory* definition, which could be read to include stand-alone increases in utilization, as EPA as expressly noted in 1980, 45 Fed. Reg. at 52705 ("The increase in hours of operation is a change in the method of operation."). See 57 Fed. Reg. at 32316 (because *statutory* definition could "encompass the most mundane activities," agency has defined "modification" to "include common-sense exclusions from the 'physical or operational change' component of the definition"). The exemption – also part of 1992 and 2002 PSD rules that even Duke does not claim to employ an hourly rate test – confines coverage in an important way, but by its plain terms does not preclude consideration of emissions increases resulting from physical or operational changes.

III. THE ACT DOES NOT REQUIRE USE OF AN HOURLY RATE MEASURE FOR PSD EMISSIONS "INCREASES"

Duke's brief (Br. 42-47) mingles two separate statutory arguments: that Congress ratified some specific pre-existing NSPS or administrative PSD regulations in the 1977 PSD enactment (the argument rejected on its merits in *New York*), or that it commanded that the statutory term "modification" be implemented by identical regulations in both NSPS and PSD (the argument accepted by the Fourth Circuit in this case, but found to have been waived in *New York*). The two arguments, inconsistent with one another (see Pet. App. 18a), are alike in two respects: they are both jurisdictionally improper challenges to the regulations EPA actually adopted, and they are both, in any event, meritless.

The statute does not support Duke's argument (Br. 42-44)

that the 1977 PSD enactment's use of the Section 111(a) statutory definition of "modification" constituted a command that EPA must use a *regulatory* standard from the 1975 NSPS regulation. Nowhere does the 1977 PSD enactment purport to incorporate any prior regulation concerning how to measure emissions increases. See *New York*, 413 F.3d at 18-20; *Cinergy*, 458 F.3d at 710.

The 1975 NSPS regulations contained "different" and "possibly inconsistent" definitions of "modification," only one of which contained the hourly rate standard. *New York*, 413 F.3d at 19 (citing 40 C.F.R. 60.2(h), 60.14(b)); see *id.* at 12 ("[i]n its various permutations, this regulatory framework had not been long in place when" Congress enacted the 1977 legislation). The regulations in place under the 1974 administrative PSD program contained other definitions, lacking any reference to hourly rates, 40 C.F.R. 52.01(d), while the non-attainment NSR program contained yet a different test. See *New York*, 431 F.3d 801, 802 (Williams, J., conc. den. reh'g en banc) (discussing "potential allowable emissions" test at 41 Fed. Reg. 55524, 55528 (Dec. 21, 1976)). There is no evidence Congress was aware of any of these regulatory definitions (none of them judicially reviewed), let alone that it intended to entrench any of them as statutory requirements. See *Brown v. Gardner*, 513 U.S. 115, 121 (1994) (citing *United States v. Calamaro*, 354 U.S. 351, 359 (1957)); *Johnson v. United States*, 529 U.S. 694, 726 (2000) (Scalia, J., dissenting); cf. *Bragdon v. Abbott*, 524 U.S. 624, 631-32 (1998) (finding regulatory ratification where Congress not only was aware of but expressly referred to and incorporated regulations) (citing 42 U.S.C. 12201(a)).

Congress, in 1977, *did* adopt *other* pre-existing regulations as statutory requirements. It amended the definition of "modification" in CAA Section 111(a) by adding a new legislative exemption for coal-conversion projects approved under Section 119(d) of the Act, one that tracked a

pre-existing 1975 NSPS regulatory exemption.[15] And "elsewhere" in the amendments, Congress "incorporate[d] regulatory provisions expressly by reference." *New York*, 413 F.3d at 19 (citing Pub. L. No. 95-95, § 129(a)(1), 91 Stat. 685, 745 (1977); 42 U.S.C. § 7502 note); see also Pub. L. No. 95-95, § 223, 91 Stat. at 764 (adding since-superseded CAA § 211(g)(3), 42 U.S.C. 7545(g)(3) (1978), referring to specific EPA regulations concerning fuel additives). When Congress wished to incorporate existing EPA regulations in the 1977 legislation, it knew how to do so.

Section 168 of the Act (cited in Duke Br. 44) provides that pre-1977 PSD regulations "shall remain in effect" "[u]ntil such time as an applicable implementation plan is in effect for any area" that complies with new statutory PSD provisions, and would continue to govern projects commenced between July 1, 1975 and August 7, 1977. 42 U.S.C. 7478(a), (b). It manifestly expresses an intent to phase out the preexisting regulations, not capture them in statutory amber. See *Alabama Power*, 636 F.2d at 363; 42 Fed. Reg. at 57459, 57471 (discussing "comprehensive changes" to regulations required by 1977 statute's "comprehensive new requirements"). There is no evidence that Congress, outside the narrow provisions just discussed, intended for pre-1977 regulations to constrain EPA's rulemaking authority. See *National Muffler Dealers Ass'n, Inc. v. United States*, 440 U.S. 472, 485-86 (1979) (citing *Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 101 (1939)).[16]

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[15] See Pub. L. No. 95-95, § 109(f), 91 Stat. 685, 703 (1977), codified at 42 U.S.C. 7411(a)(8) (a "conversion to coal," under CAA § 119(d)(5) "shall not be deemed to be a modification for purposes of paragraphs (2) and (4) of this subsection."). See 40 C.F.R. 60.14(e)(4) (1975) (NSPS regulation exempting "conversion to coal" under § 119(d)(5)); 39 Fed. Reg. 36946, 36948 (Oct. 15, 1974).

[16] Duke quotes (Br. 46) the House Report for the proposition that "existing sources • • • and their emissions' [*sic*] capacity are 'grandfathered.'" H.R. Rep. No. 95-294, at 144 (1977), but fails to mention that Congress *rejected* the House bill's approach, which premised PSD "baseline

Nor is there any merit to Duke's *other* account of what the Act is supposed to have unambiguously provided – Duke's passing nod (Br. 43) to the Fourth Circuit's *Rowan*-based theory that Congress intended that regulations implementing the term "modification" for NSPS and NSR must be the same. Duke's own commitment to this theory is weak indeed, for it advocates an NSR "modification" test substantially different from the NSPS test. Duke fails to explain why Congress would impose as an unyielding statutory requirement one particular feature of the regulatory test for NSPS modifications – the hourly rate test enunciated at 40 C.F.R. 60.14(b) – while simultaneously allowing large departures with respect to others, including minimum significance thresholds and netting, or why, if the mandate is regulatory sameness, the NSPS test should be preferred over an NSR test that is far more consonant with the statutory text, see *New York*, 413 F.3d at 38-40; 45 Fed. Reg. at 52700.

Contrary to Duke's argument (Br. 43), *IBP v. Alvarez*, 126 S.Ct. 514 (2005), does not make the "presumption of uniform usage irrebut[t]able" here. That decision construed the term "principal activity or activities" as interpreted by *Steiner v. Mitchell*, 350 U.S. 247 (1956), and as employed in two contiguous subsections of the Portal-to-Portal Act, covering worker travel "to and from * * * the principal activity or activities," and activities before and after "*said* principal activity or activities," 29 U.S.C. 254(a)(1), (2) (emphasis added). Because the second reference to "said" activities was "an explicit reference to the use of the identical term" earlier in this statute, the Court found "no plausible argument" for diverging interpretations. 126 S.Ct. at 524-25. Here, rather than simultaneously-enacted statutory subsections sharing a single "said" term, the Court encounters separate statutory programs enacted years apart using a general term with component phrases ("source," "increase,"

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concentration" on "plant capacity in existence." H.R. Rep. No. 95-297 (1977) (§ 160(c)(2)(E)(i)). See *Alabama Power*, 636 F.2d at 380-81.

"amount," "emitted") that must themselves be defined to mesh with the distinct regulatory programs. See *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343 (1997); *Cinergy*, 458 F.3d at 710 (noting that NSPS and NSR definitions were enacted "by different Congresses for different purposes").[17]

Finally, the language of the statutory definition – relegated to a cameo role in Duke's script – is inconsistent with the regulatory approach Duke claims it to command. See *New York*, 413 F.3d at 38-40.[18] Congress did not speak of increases in "rate" let alone "hourly" rate), "designed emitting capacity" (Duke CA4 Br. 8), "fundamental ability to emit pollutants" (Duke Br. 24), or "actual capacity" (Duke Br. 22, 32 n.13, 36). Congress, instead, targeted increases in the "amount" of pollutants "emitted." 42 U.S.C. 7479(2)(C), 7411(a). See *id.* 7475(b), 7479(1) (denominating emissions for the PSD program in "tons per year").

Duke dismisses arguments based on the text and structure of the Act by treating the term "purposes" as an epithet (Br. 47-50). As *Robinson* illustrates, however, no rule of statutory construction prevents a court or an agency from construing a term in light of the role it (and the provision in which it appears) plays in the overall statutory scheme. Moreover, neither our argument nor EPA's longstanding interpretation

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[17] Duke's assertion (Br. 43) that Congress explicitly defined PSD modification as "used" in NSPS is incorrect. The term appears in the PSD provision as follows: "construction when used in connection with any source or facility includes modification," 42 U.S.C. 7479(2)(C). Far from mandating identity, that usage invokes the fundamentally distinct "sources" to which the programs apply. See also Petr. Br. 45-48 (summarizing substantive differences between NSPS and NSR programs). See *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 (2004) (meaning of same term may vary depending on the "'connection in which the words are used'") (citation omitted).

[18] The 1990 Amendments to the NNSR program, which also employs the Section 111(a)(4) definition, 42 U.S.C. 7501(4), built upon EPA's NSR regulatory definition, using annual pollutant thresholds, *id.* 7511a(c), (d), 7511a(e), and "actual emissions," *id.* 7503(c)(1). Petr. Br. 15-16, 40.

of the statute and regulations privileges the CAA's "remedial purpose" over all others. On the contrary, it *also* serves the different purpose of enabling economic growth: Because the increases in actual emissions that Duke claims must be ignored at the permitting stage indisputably *do* consume available "increment," allowing projects like Duke's to proceed without emissions controls crowds out construction of new, more efficient projects. See, *e.g.*, Petr. Br. 40-41; Br. of States of New York, *et al.* 26-28.

Seeking to rescue arguments unmoored to statutory or regulatory text, Duke and its amici suggest that transplanting the NSPS hourly rate test into PSD is necessary to avoid undue burdens for industry, and request a cropping of NSR in light of later legislative developments (but see, *e.g.*, Br. of Amicus Curiae STAPPA *et al.*, at 8-12). At best, such contentions would be grist for EPA rulemaking procedures, not an enforcement action. See 42 U.S.C. 7607(b), (d)(1), (e).[19] But they also disregard the numerous exemptions built into the Act and rules. The statute exempts sources emitting less than "major" pollution thresholds entirely, *id.* 7479(1), and contains a partial exemption for modifications involving less that 50 tons per year of pollution, *id.* 7574(b). EPA's regulations, in turn, exempt individual projects not only through source-wide netting and de minimis thresholds, but also through exemptions for multiple alternative fuel and repowering projects, *id.* 51.166(b)(2)(iii)(*b*)-(*e*), and stand-alone increases in hours of operation or production rate, *id.* 51.166(b)(2)(iii)(*f*). And, contrary to assertions that stretch beyond hyperbole, the rules exempt routine maintenance, repair, and replacement. *Id.* 51.166(b)(2)(iii)(*a*).[20] See 45

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[19] Petitioners oppose EPA's October 20, 2005 rulemaking proposal, 70 Fed. Reg. 61081. But Duke's efforts to capitalize on that initiative (Br. 21-22) weaken its position in this case, since EPA's notice recognizes that the proposal is a significant departure, requiring changes to regulatory text in effect since 1980, see, *e.g.*, 70 Fed. Reg. at 61088-89.

[20] See, *e.g.*, Br. of Alabama, *et al.* 17 ("nearly *every* physical change made

Fed. Reg. at 52726 ("adequate exemptions have been provided in today's regulations and no further ones are authorized under the Act"). But neither Act nor regulations provide for the exemption Duke seeks here — "perpetual immunity," *Alabama Power*, 636 F.2d at 400, for old sources undergoing renovations that increase the amount of pollution actually emitted by thousands of tons per year.

As Judge Posner explained in *Cinergy*, the rule sought by Duke here, "besides not conforming well to the language of the regulation," would encourage investment choices made only to "elude the permit requirement," "distort the choice between rebuilding an old plant and replacing it with a new one," and open "a loophole that would allow pollution to soar unregulated." 458 F.3d at 709, 711. See Br. of Amici Curiae STAPPA *et al.* 7-16; Br. of States of New York, *et al.* 22-29; Br. of Former Administrators Browner and Train 21-24. It would undermine an entire statutory structure predicated in every particular (see Petr. Br. 39-42) on a realistic accounting of increases in the "amount * * * emitted" by major sources of pollution. Duke's policy arguments are misguided, and provide no basis to ignore the statutory allocation of judicial authority in CAA implementation, 42 U.S.C. 7607(b), (d), (e).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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to *every* component of *every* sub-part unit will trigger application of new NSR/PSD requirements") (emphases original). Duke's massive renovation of "geriatric" units (JA 201), see Pet. Br. at 19-20 & nn.12-14, serves as a real-world corrective. Despite the scope and cost of its projects, below Duke invoked the regulatory exemption for "routine maintenance," an issue that would be taken up on remand. See Pet. App. 7a-8a n.2.

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ENVIRONMENTAL DEFENSE, ET AL.,
Petitioners,

v.

DUKE ENERGY CORPORATION, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF OF THE STATES OF ALABAMA, ALASKA, COLORADO, INDIANA, KANSAS, NEBRASKA, SOUTH CAROLINA, SOUTH DAKOTA, VIRGINIA, AND WYOMING, AND THE STATE OF WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Clean Air Act's provision for expedited judicial review of "final action" promulgated by EPA, 42 U.S.C. §7607(b), stripped the courts below of authority to consider a new interpretation of EPA's 1980 New Source Review rules that was developed and imposed in an enforcement action initiated in 1999; and

2. Whether EPA unlawfully interpreted its New Source Review rules to convert existing electric generating plants into "new sources," even though those plants had not undergone "modifications" as that term has been defined and used for decades under those rules and under the Act.

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INTEREST OF AMICI

In the Clean Air Act, Congress assigned to the States the primary responsibility for the day-to-day regulation of air pollution. "In the proper discharge of their responsibilities to implement the [Act] in different conditions and localities nationwide, the States maintain permanent staffs within specialized agencies." *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 516 (2004) (Kennedy, J., dissenting). These state environmental regulators are committed public servants who "take pride in their own resourcefulness, expertise, and commitment to the law ...." *Id.*

The amici States oppose EPA's sweeping, enforcement-inspired interpretation of the Clean Air Act's NSR/PSD provisions for three reasons, all of which relate to the States' role as the principal front-line enforcers of the Act's requirements. Specifically, EPA's current reading –

- Contradicts EPA's earlier interpretations and, indeed, EPA's past guidance to state regulators;
- Envisions a breathtaking transfer of enforcement authority from the States to the federal government and thus undermines the Clean Air Act's federalism-respecting foundations; and
- Risks needlessly overwhelming the limited resources available to state environmental agencies.

This Court should reject EPA's current interpretation-qua-litigating-position. Doing so will encourage principled agency decisionmaking, preserve the state-federal balance, and ensure a robust, yet manageable, NSR/PSD program.

SUMMARY OF THE ARGUMENT

EPA's current litigating position concerning the Clean Air Act's NSR/PSD rules (1) flatly contradicts its own earlier interpretations and guidance to States, (2) violates the fundamental principles of federalism that underlie the Act, (3) risks needlessly overwhelming the state regulators who

are responsible for the Act's day-to-day implementation, and (4) entails hidden pitfalls even as a matter of environmental policy. The Court should reject it.

1. EPA's litigating position (which, with respect, is all it is) is not entitled to deference, for two reasons. First, EPA has consistently blessed state environmental regulators' NSR/PSD interpretations contrary to the one it now urges. The Alabama Department of Environmental Management's experience is illustrative: Consistent with express EPA guidance, ADEM initially interpreted – and has since then consistently interpreted – its own NSR/PSD rule to require an increase in a unit's hourly emission rate as a prerequisite to "major modification" analysis. Despite its constant supervision of ADEM's program (right down to its review of individual NSR/PSD permits), EPA has never once suggested that ADEM misunderstands the rules' text or purpose. Second, and more generally, EPA's own approach to the rules here at issue has been frightfully inconsistent. Indeed, during the last 25 years, EPA has at seven different junctures offered at least three different and mutually exclusive interpretations of those rules.

2. On two grounds, EPA's enforcement-inspired interpretation undermines the Clean Air Act's carefully calibrated state-federal enforcement scheme, which charges the States with primary enforcement responsibility. First, because under it, nearly *every* change made to *every* component of *every* sub-par unit would trigger application of stringent new NSR/PSD emission-limit requirements, EPA's sweeping reading would cause the exception of federal intervention to swallow the rule of state control. Second, there is a straightforward – and federalism-respecting – solution for States that want tougher new-source controls: they should simply enact them as a matter of state law. The Clean Air Act establishes a baseline of protection sufficient to safeguard human health and safety, but by its own terms it also expressly invites States to tighten requirements as they see fit and thus act as Brandeisian "laboratories."

3. EPA's litigating position – which, again, would make nearly every tweak to an existing plant the occasion for rigorous pre-construction review – is also wildly impractical. Our chief concern here is the overwhelming burden with which EPA's current interpretation would saddle the state regulators tasked with the ground-level enforcement of Clean Air Act requirements. If on top of their existing duties – developing and implementing SIPs and processing NSR and PSD applications under current law – state regulators had to deal with the flood of new requests that EPA's current view would unleash, the burden would overwhelm existing resources, leading either to an administrative breakdown, a bureaucratic explosion, or both.

4. Important public-policy considerations counsel against EPA's litigating position, as well. First, of course, there is the sheer expense (*i.e.*, the permitting process itself plus the required retrofits) that EPA's current view would entail. Our concern here is less with industry costs as such than with the near-certainty that industry would simply pass its own increased costs on to consumers in the form of rate hikes. That concern is particularly acute where, as here, the affected consumers are utility rate-payers, whose interests state Attorneys General are statutorily obliged to protect. Second, there are good clean-air reasons to oppose EPA's enforcement position. The cost – in money, time, and labor – of EPA's enforcement initiative will create what EPA itself has called a "perverse" incentive for industry to eschew upgrades in favor of limping by on old, deteriorating, and environmentally-unfriendly equipment.

5. Petitioners' jurisdictional argument clearly misses the mark. Section 307(b) encompasses only challenges to "promulgat[ions]" of "nationally applicable regulations" and other EPA "final action[s]." This case, which concerns the propriety of EPA's application of its NSR/PSD rules in the context of an ongoing enforcement action, involves no such challenge. Moreover, it simply cannot be the law that when EPA itself initiates an enforcement proceeding in district court, the target is faced with the choice of either (1)

declining to defend and accepting an adverse judgment or (2) instituting a duplicative proceeding in the D.C. Circuit.

ARGUMENT

This brief is no apology for industry. In a perfect world, with blank statute books and unlimited resources, the amici States might opt for the type of enforcement agenda EPA is pursuing here. Our disagreement with EPA (with one notable exception) is less about environmental policy than about the legality and real-world practicality of EPA's current enforcement initiative. As matters now stand, EPA's actions are both illegal and wildly impractical.

I. EPA's Current Litigating Position Is Not Entitled to Deference, Particularly Given EPA's Consistent En7 dorsement of State Agencies' Longstanding PSD Inter7 pretations to the Contrary.

We start with the question of legality. The notion that there is only one plausible reading of the Clean Air Act's 1980 PSD rule,[1] requiring intensive pre-construction review based solely upon a projected increase in a plant's hours of operation (Pet. Br. 2, 25, 34, 49; EPA Br. 13, 19-20; NY Br. 7), is, as we will explain, plainly wrong. So, too, is the related suggestion that EPA has had anything like a "longstanding" interpretation (Pet. Br. i; NY Br. 1; NJ Br. 2) to that effect.[2]

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[1] 45 Fed. Reg. 52,676 (Aug. 7, 1980) (codified at 40 C.F.R. §51.166 (1987)).

[2] To its credit, EPA *itself* does not even claim here to have had a longstanding position concerning the meaning of the 1980 PSD rule. And with good reason; as we will show, EPA's own reading of the rule has been anything but consistent. *See infra* at 10-14. Indeed, even its brief in this Court seems more than a bit schizophrenic. At one point, for instance, EPA asserts that "[t]he *only reasonable construction* of the PSD regulations is that a physical change that increases a source's hours of operation is a 'modification.'" EPA Br. 20 (emphasis added). A bit later, EPA says, quite differently, that "it would have been *permissible* for EPA to" construe the term "modification" for PSD purposes the way it is used in the NSPS program, *i.e.*, to require an increase in the hourly rate of emissions. *Id.* at 35.

Duke itself has made the textual case against EPA's current reading of the 1980 PSD rule (Duke Br. 33-36), and there is no point in replowing that ground here. Our purpose is to demonstrate that EPA's current hours-of-operation-based litigating position does not warrant deference (1) because the agency has consistently blessed state environmental regulators' interpretations to the contrary; and (2) more generally, because it is just the latest in a bob-and-weave succession of contradictory agency pronouncements.

A. EPA Has Consistently Blessed State7Agency PSD Interpretations Contrary to the One It Now Ad7 vances.

As Justice Kennedy recently observed, "[i]n the proper discharge of their responsibilities to implement the [Clean Air Act] in different conditions and localities nationwide, the States maintain permanent staffs within specialized agencies." *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 516 (2004) (Kennedy, J., joined by Rehnquist, C.J., and Scalia and Thomas, JJ., dissenting). "These state employees, who no doubt take pride in their own resourcefulness, expertise, and commitment to the law, are the officials directed by Congress to make case-by-case, site-specific, determinations under the Act." *Id.* In the State of Alabama – whose experience is described below merely for purposes of illustration – the agency to which Justice Kennedy's observation refers is the Alabama Department of Environmental Management ("ADEM").

From the very beginning, ADEM has understood that PSD "major modification" review is triggered only by activity that causes an increase in a plant's hourly rate of emissions and not, importantly, by a recovery or extension of the plant's hours of operation. ADEM first promulgated PSD regulations in January 1981. Later that same year, those regulations were expressly "approv[ed]" by EPA as "comply[ing] with the latest guidance issued by EPA to assist States in preparing State implementation plan (SIP) revisions for PSD." 46 Fed. Reg. 55,517 (Dec. 10, 1981) (codified at 40

C.F.R. §52.50). As both ADEM's current Air Division chief (since 1996) and his predecessor (chief from 1982 to 1996) have testified, ADEM's EPA-approved PSD regulation has always "focused on the maximum hourly rate of emissions," such that "[o]nly if the maximum hourly rate of emissions increased as the result of a project or activity could the activity potentially trigger PSD requirements." Decl. of Richard E. Grusnick, Former Chief, ADEM Air Division ("Grusnick Decl."), ¶9, in *United States v. Alabama Power Co.*, 372 F. Supp. 2d 1283 (N.D. Ala. 2005) (App. A to this brief). In other words, ADEM has at all times read its PSD regulation to mean that "major modification" review is triggered only by "those projects or activities that increase the maximum capacity of a unit or facility to emit more pollution on an hourly basis," and, equally importantly, not by "a project or activity that is followed by an increase in the availability or utilization of a facility." Decl. of Ronald W. Gore, Chief, AEDM Air Division ("Gore Decl."), ¶¶5, 7, in *Alabama Power*, 372 F. Supp. 2d 1283 (App. B to this brief).

Notably, ADEM's understanding and application of the term "major modification" – *i.e.*, to focus exclusively on activity that results in an hourly-rate increase – "has not changed substantively since [the PSD rule's] original adoption in 1981." Grusnick Decl. ¶10. Indeed, ADEM's interpretation of the PSD regulation has been a model of consistency. Only three individuals have headed ADEM's Air Division since the PSD program came onto the scene in 1980. Under their principled leadership – and through the tenures of seven different Governors (four Democrats and three Republicans) and six different Attorneys General (three of each party) – ADEM has persisted in its hourly-rate-based understanding of the "major modification" analysis.

ADEM has interpreted its EPA-approved PSD regulation to focus on hourly-rate increases and to exclude hours-of-operation increases not only because that is the most sensible reading of the regulation's language but also, and more significantly for present purposes, because *that is how EPA itself said to interpret it.* In January 1981, and then again in

June of that same year - just about the time ADEM was requesting and obtaining EPA's blessing for its own PSD regulations - EPA's Director of Stationary Source Enforcement, Edward Reich, confirmed in two separate memoranda that PSD applicability "is determined by evaluating any change in [hourly] emissions rates caused by" a physical or operational change. JA 28. The reason, Reich explained, was that, otherwise, "[a]ctual emissions could increase only if there is an increase in the production rate or hours or operation, both of which are specifically exempt from PSD review." *Id.* (citing 40 C.F.R. §52.21(b)(2)(iii)(f)); *accord* JA 35 ("[I]n the absence of any SIP or permit limitations," the "increase in hours of operation at the power plant" would not "be considered a modification.") (citing 40 C.F.R. §52.21(b)(2)(iii)(e) and (f)).[3]

To precisely the same effect, just a year later, EPA's regional chief of the Air & Waste Management Division, James Wilburn, issued a report "to all state and local agency directors" - *i.e.*, to agencies like ADEM - one purpose of which was to alert state regulators to "interpretations of EPA regulations." U.S. EPA, Region IV, Memorandum No. 4AW-AM, at 1 (July 12, 1982) (App. C to this brief). The report addressed the very question presented here, and answered it decisively in favor of ADEM's understanding:

> *Question*: A source to be modified will be subject to PSD due to a significant increase in SO_2 emissions. After the modification there will be no increase in the hourly particulate emissions. The source presently operates at 4,000 hours per year. If the PSD permit would allow 7,000 hours per year, would this be judged a significant increase in particulate emissions,

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[3] The concerted efforts to marginalize Mr. Reich as just some guy - or, worse, a rogue bureaucrat - are disingenuous. *See* EPA Br. 13 ("mid-level EPA official"); NY Br. 18 ("single agency employee"). Mr. Reich was not just some guy, he was *the* guy - the director of the very EPA division whose responsibility it was to speak to the correct interpretation of the PSD regulations.

> and cause the source to be subject to PSD for particulate?
>
> *Answer*: No. Since the modification does not *cause* any increase in [the referenced hourly particulate] emissions, no increase in annual emissions should be calculated.

Id. at 2. Notably, North and South Carolina, like Alabama, are in EPA "Region IV"; accordingly, the state regulators whose permitting decisions are being second-guessed in this enforcement action presumably received Mr. Wilburn's directive, as well. What is more, North and South Carolina, like Alabama, adopted their own PSD rules (and obtained EPA approval) during the Reich-Wilburn era. *See* 47 Fed. Reg. 7836 (Feb. 23, 1982) (North Carolina); 47 Fed. Reg. 6017 (Feb. 10, 1982) (South Carolina).

It should be enough that agencies like ADEM acted against the backdrop of EPA's own programmatic advice in crafting and implementing state PSD regulations. But there is much more. Having initially approved ADEM's PSD rules as in "compl[iance] with the latest guidance issued by EPA" concerning the PSD program and codified those rules into federal law (*supra* at 5), EPA has during the last 25 years repeatedly blessed ADEM's hourly-rate-based understanding of its PSD regulation. Initially, and most generically, as an exercise of its "oversight responsibility to ensure that the state program satisfied the requirements of the Clean Air Act," EPA "would periodically issue policy memoranda which would provide EPA's guidance on major air program policy issues." Grusnick Decl. ¶16. None of those documents, however, ever "communicate[d] to ADEM the interpretations of PSD preconstruction permitting requirements that [EPA] advances" in the present enforcement initiative. *Id.*

More specifically, "EPA had numerous, regular opportunities to identify ADEM's policies and offer suggestions in the event it disagreed with ADEM on a point of interpretation." *Id.* ¶17. First, EPA conducted "annual on-site audit[s] of ADEM's Air Program"; these audits "generally included a

mid-year review where Regional EPA staff members would visit ADEM, meet with staff, perform file reviews of individual plants, and review other records." *Id.* Second, as part of the "federal grant process" there was an "annual negotiation of commitments between EPA and the state" during which EPA could identify topics of "high priority" and leverage "commitments from ADEM." *Id.* Third, and separately, EPA and ADEM negotiated annual Clean Air Act enforcement agreements covering all aspects of compliance and enforcement, including, the PSD program. Significantly here, these agreements stressed the importance of EPA and ADEM "resolving disputes, *especially differences in interpretation of regulations or program goals as they may affect resolution of individual instance[s] of non-compliance.*"[4] The agreements also provided that EPA and ADEM would "conduct monthly conference calls" as a means of ensuring a coordinated enforcement strategy.[5] Tellingly, "[n]o audit or grant discussion ever targeted implementation of the modification provisions of the PSD regulations consistent with EPA's current interpretation." Grusnick Decl. ¶18.

Finally, and more specifically still, as part of what this Court has called its "sweeping" "surveillance," "oversight," "supervisory," and "checking" responsibilities, *see Alaska*, 540 U.S. at 469, 484, 485, 486, 487, 488, 490, 492, 496, 502, EPA routinely reviewed individual PSD permits issued by ADEM. To facilitate that review, the Clean Air Act itself required ADEM to inform EPA specifically of "'every action' taken in the course of the permit approval process" and further guaranteed EPA the right to submit comments concerning proposed permits. *Id.* at 508 (Kennedy, J., dissenting) (quoting 42 U.S.C. §7475(d)). Moreover, as illustrated by the *Alaska* decision itself - the central premise of which is that EPA can and should look over state agen-

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[4] Alabama/EPA Compliance Assurance Agreement 2 (1996) (emphasis added) (Appendix D to this brief).

[5] *Id.* ADEM's files contain similar agreements for 1986, 1989, and 1990.

cies' shoulders to ensure the proper administration of the PSD program - EPA could always have vetoed ADEM's issuance of a permit or otherwise moved to block a change authorized by ADEM. *See id.* at 473-74, 480-81 (majority opinion). Tellingly, it never did.

The point here is simply this: Knowing full well ADEM's hourly-rate-based understanding of the PSD modification rule (and, indeed, having counseled ADEM to embrace that understanding to begin with), it was incumbent upon EPA to speak up if it thought ADEM's understanding or application of that rule was out of whack. Despite hundreds of opportunities, EPA never did so. Of course, if EPA believed ADEM was way off track (and there is, to be sure, a *huge* practical difference between ADEM's consistent interpretation and the one that EPA urges in this litigation), it could have issued a "SIP call" requiring ADEM either to change its ways or to forfeit its permitting authority altogether. *See* 42 U.S.C. §7410(c)(1), (k)(5). But ADEM never received so much as a tap on the shoulder. By now pulling the rug out from underneath ADEM 20 years after the fact, EPA has "indulge[d]" in precisely the "inequitable conduct" this Court implicitly forbade in *Alaska*, 540 U.S. at 495. *See also id.* (emphasizing that it is essential for EPA "to act on a timely basis" if it is going to second-guess state regulators); *id.* at 513 (Kennedy, J., dissenting) (recognizing the "need for finality in state permitting decisions" and that "a post hoc veto procedure" upsets "reliance and expectation interests").

B. EPA's Own Pronouncements Concerning the PSD Rule Have Been Frightfully Inconsistent.

Alabama's interpretation of the PSD rule's modification provisions – *i.e.*, to hold hours of operation constant and to require as a prerequisite to "major modification" analysis an increase in the hourly emission rate – is thus not only EPA-blessed but also truly longstanding and consistent. EPA itself cannot make a similar claim. It has, with respect, been all over the map. Presently, of course – by which we mean

currently in the life of this particular enforcement proceeding - EPA advances a so-called "actual-to-projected-actual" understanding of the 1980 PSD rule. Pursuant to *that* interpretation, an increase in annual emissions may be triggered by an increase in a source's hours of operation standing alone, that is, even absent an increase in the source's hourly emission rate or, indeed, despite a decrease in that rate. *United States v. Duke Energy Corp.*, 278 F. Supp. 2d 619, 640 (M.D.N.C. 2003) (describing EPA's position).

That has not always been EPA's view. In fact, since its adoption in 1980, EPA has advanced *at least three different and mutually exclusive interpretations* of the PSD rule. Tracing the evolution can be a dizzying exercise:

> ***Take One***: Initially, in 1981, EPA endorsed the so-called "actual-to-actual" test (used, *e.g.*, by ADEM), pursuant to which a "major modification" occurs only where activity increases a unit's hourly emission rate. *See supra* at 5-8.
>
> ***Take Two***: Then, in its 1988 "WEPCo determination," EPA asserted that the "actual-to-potential" test, pursuant to which post-change emissions are theorized by multiplying a unit's maximum emission rate by the total number of hours in an entire year, was the *only* permissible way to measure PSD modifications. In so asserting, EPA stated categorically that the 1980 PSD regulations "provide no support for" the actual-to-projected-actual test that it now urges. JA 256 n.7.
>
> ***Take Three***: In the wake of the Seventh Circuit's rejection of its actual-to-potential test, *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 917 (7th Cir. 1990) - and, seemingly, that court's instruction to apply an actual-to-actual test using "present hours and conditions," *id.* at 918 n.14 - EPA went back to the drawing board. It did not, however, return to its actual-to-actual interpretation but, instead, embraced the very actual-to-projected-actual test it had earlier insisted had "no support" in the regulation. JA 66-72.

Take Four: In its 1992 "WEPCo Rule," EPA formally adopted the once-rejected actual-to-projected-actual test for measuring emissions but, curiously, made it optional and available only to utilities. *See* 40 C.F.R. §51.166(b)(21) & (b)(32) (1993).

Take Five: Then, in 1998, EPA asserted in a proposed rule that the actual-to-potential test (abandoned after *WEPCo*) was and had always been the sole means of measuring emissions increases for PSD purposes - at least for non-utility sources. *See* 63 Fed. Reg. 39,857, 39,859 n.4 (July 24, 1998).

Take Six: In 2002, EPA promulgated a new, mandatory actual-to-projected-actual methodology for all existing sources (not just utilities) and, in so doing, reiterated its view that the actual-to-potential test remained the governing standard under the preexisting 1980 PSD rule. *See* 67 Fed. Reg. 80,186, 80,191-92, 80,199 (Dec. 31, 2002).

Take Seven: Finally, in litigating this very case, EPA initially invoked the actual-to-potential test as the appropriate means of measuring increases under the 1980 rule, but appears to have settled, at last, on a version of the actual-to-projected actual analysis. *See Duke Energy*, 278 F. Supp. 2d at 640 & n.17.

In the words of its own former general counsel, EPA's current "multi-billion dollar" NSR/PSD enforcement initiative rests "on the premise that the same words in the law meant one thing in 1985, another thing in 1992, still another in 1996, yet another in 1998, and will someday mean something still different in the future." *Joint Hearing on NSR Issues Before the Senate Environment and Public Works Comm. and the Senate Judiciary Comm.*, 107th Cong., pp. 2-3 (July 16, 2002) (statement of E. Donald Elliott) ("Elliott NSR Test."). It is a dubious premise.

As a *practical* matter, New Jersey is exactly right when it says that "[t]he States' ability to plan for and meet their obligations under the CAA depends on the stability of

nationwide regulations." NJ Br. 8. The problem is that EPA's approach to the NSR/PSD rules has been anything but "stab[le]." Quite the contrary, EPA's "many changing interpretations of NSR over the years have created a legal mess of baffling complexity ...." Elliott NSR Test. at 1.

More importantly, as a *legal* matter, EPA's "zigs and zags represented by its contradictory post-WEPCO statements and rules" and its failure to speak "with one voice, or a consistent voice, or even a clear voice, on this issue," *Alabama Power*, 372 F. Supp. 2d at 1306, fatally undermine its claim to deference. *See, e.g., Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987). That is particularly true where, as here, the agency's interpretation has "fluctuated" even "as [the] case has progressed." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 539 n.29 (1982).

It is true, of course, that "[a]n initial agency construction is not instantly carved in stone." *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 863 (1984). But it is equally true that "'[o]nce an agency gives its regulation an interpretation'" – which, the case law reflects, it may do either through regional guidance determinations (*e.g.*, the Wilburn memo) or, a fortiori, through formal, central-office guidance (*e.g.*, the Reich memos) – "'it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking.'" *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1033-34 (D.C. Cir. 1999) (quoting *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579, 586 (D.C. Cir. 1997)) (finding that FAA had unlawfully changed an interpretation earlier adopted by its Alaskan Region); *accord, e.g., Caruso v. Blockbuster-Sony Music Entertainment Centre at the Waterfront*, 193 F.3d 730, 737 (3d Cir. 1999) (Alito, J.). Given that its current, enforcement-inspired interpretation of the 1980 PSD rule contradicts its earlier view (or *views*, as the case may be), EPA's position here can be understood only as a "convenient litigating position," to which no deference is due. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988).

* * *

It is worth pausing briefly to take stock of the story that EPA's present enforcement initiative - and the newfound view of the NSR/PSD rules that underlies it - requires the Court to believe. The current batch of enforcement actions alleges rampant, if not near-universal, non-compliance with NSR/PSD rules stretching back some 20 years. How, on EPA's retelling, did we get to this point? *First*, we must assume that nearly every major utility-industry player (and, more particularly, every major player's lawyers) either fundamentally misunderstood or blatantly ignored EPA guidance on the meaning of the term "major modification." *Second*, and worse, we must assume that the state environmental agencies that reviewed and approved the hundreds of building projects now under challenge (ADEM in Alabama Power's case, the North Carolina Department of Environment and Natural Resources in Duke's) likewise either misunderstood or ignored EPA guidance. *Finally*, and most bizarrely, we must assume that the EPA regulators themselves, whose very business it was to look over the States' shoulders, were (at best) asleep at the wheel. EPA's story here is either an elaborate conspiracy theory or a monument to bureaucratic incompetence. Occam's Razor suggests a different explanation: EPA's current litigating position just wasn't the prevailing understanding of NSR/PSD applicability during the two decades that preceded the current enforcement initiative's launch in 1999.

II. EPA's Litigating Position Undermines the Clean Air Act's Carefully Calibrated State/Federal Enforcement Scheme.

Congress enacted the Clean Air Act with federalism firmly in mind. There are two important federalism-related points worth making here, neither of which the state amici supporting petitioners seem to have come to grips with. First, whereas the Act makes States primarily responsible for regulating air pollution, and carves out NSR/PSD as a narrow exception to that general rule of state control, the

position advocated by petitioners and their state amici would reverse matters entirely. It would make almost every tweak to an existing source the occasion for intrusive federal review and intervention. Second, by its very terms, the Clean Air Act establishes only a regulatory baseline; States with the desire and the gumption can *always* enact tougher environmental controls. States that have declined to do so have no standing to complain.

A. Under EPA's Litigating Position, the Exception of Federal Intervention Would Swallow the Rule of State Control.

It is a well-recognized fact, as the state amici supporting petitioners seem to appreciate, that the Clean Air Act "relies on a close and equal partnership between federal and state authorities to accomplish congressional objectives." *Alaska*, 540 U.S. at 518 (Kennedy, J., dissenting). In the cooperative scheme established under the Act, States do not play "the role of mere provinces or political corporations" but, "instead, of coequal sovereigns entitled to the same dignity and respect." *Id.* Indeed, the Act's language itself makes clear that "air pollution prevention ... and air pollution control at its source is the *primary* responsibility of States and local governments." 42 U.S.C. §7401(a)(3) (emphasis added); *see also id.* §7407(a) (States have "primary responsibility").

Pursuant to the scheme that Congress established, EPA initially sets national ambient air quality standards ("NAAQS") to protect public health and welfare, 42 U.S.C. §7409, and States, in turn, develop detailed state implementation plans ("SIPs") that specify schedules, compliance timetables, and emission limitations for specific sources, including electric utility plants, *id.* §7410(a). States must include in their SIPs a program for pre-construction review of construction activity that creates new pollution, the aim being to ensure that pollution *not* originally accounted for under a SIP is reviewed and regulated to protect the NAAQS before it is emitted. *Id.* §7410(a)(2)(D). EPA must approve a SIP if it meets the criteria specified in §7410(a).

See Train v. NRDC, 421 U.S. 60, 78-79 (1975).

As a result of the state-federal balance that Congress struck, EPA is generally forbidden to micromanage state emission-control policies with respect to existing sources. Rather, while EPA is "plainly charged by the Act with the responsibility for setting" the NAAQS, "[j]ust as plainly ... it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met." *Id.* at 79. Congress gave EPA "no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards" of §7410(a). *Id.* Rather, so long as the "ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air," a State is "at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Id.*; *see also Union Elec. Co. v. EPA*, 427 U.S. 246, 269 (1976) ("Congress plainly left with the States, so long as the national standards were met, the power to determine which [existing] sources would be burdened by regulation and to what extent.").

The NSR/PSD rules at issue here constitute a narrow exception to the general rule under the Act that States have primary responsibility to determine whether and how to regulate pollution sources. Indeed, in *Train*, this Court specifically referred to the emission limits imposed by the Act's New Source Performance Standards ("NSPS") provisions, *see* 42 U.S.C. §7411, as an "[e]xception[]" to EPA's decidedly "secondary role" in "the process of determining and enforcing the specific, source-by-source emission limitations." 421 U.S. at 78 & n.16. When enacting the NSPS program, Congress considered a more sweeping program that would have subjected existing sources, as well as new, to federally-established limits. Significantly, though, noting cost considerations and the difficulty of retrofitting existing sources, Congress opted not to pursue that course, *see* S. Rep. No. 91-1196, at 15-16 (1970); instead, while requiring

new sources to install the latest control technologies, Congress left existing sources subject to state-established SIP limits. *See* 116 Cong. Rec. 42,520 (1970). The *Train* Court's emphasis on NSPS exceptionalism, of course, carries over jot-for-jot to the NSR/PSD program at issue here, for the simple reason that the NSR program defines the term "modification" - which for present purposes is what triggers new NSR-driven emission limits and thus displaces traditional state control - by reference to the NSPS program's use of the same term. *See* 42 U.S.C. §§7479(2)(C), 7501(4). *See also Alaska*, 540 U.S. at 491 (even the PSD program "places primary responsibilities and authority with the States, backed by the Federal Government").

EPA's position here turns the Clean Air Act on its head and causes the exception of federal intervention to swallow the rule of state control. Under EPA's current regulatory interpretation, the rigorous NSR/PSD permitting process (and the establishment of new emission limits) would be triggered by any physical or operational change to an existing source that facilitated any increase in hours of operation and thereby increased annual emissions - even without a corresponding hourly-rate increase or, for that matter, despite an hourly-rate decrease. But of course nearly *every* repair or replacement of damaged, deteriorating, or malfunctioning equipment will result in an hours-of-operation increase (that being the point of the repair) and thereby - assuming constant, or even marginally reduced, rates of emission - result in an increase in actual emissions. Accordingly, under EPA's view, nearly *every* physical change made to *every* component of *every* sub-par unit would trigger application of new NSR/PSD requirements. (Indeed, when wearing its rulemaking hat, EPA has recently and candidly conceded that its position "in briefs in various enforcement-related cases" - presumably a reference to

cases like this one - would make "virtually all changes, even trivial ones," subject to NSR requirements.[6])

The risk is not hypothetical. Take, as just one example, a 1996 enforcement proceeding brought by EPA against the Georgia-Pacific Corporation. There, EPA alleged that Georgia-Pacific had, at a number of its plants (two of which were in Alabama), engaged in "construction" or "major modification" activity without the required PSD permits. *See* Consent Decree at 1, *United States v. Georgia-Pacific Corp.*, No. 1 96-CV-1818-FMH (N.D. Ga. July 18, 1996). That enforcement proceeding was resolved pursuant to a consent decree, which constituted "full settlement" for, among other things, the PSD "modifications" listed in an appendix to the decree. *Id.* at 35-36. The catalogue of charged "modifications" spans 54 pages, numbers 994 individual items, and stretches back some 19 years. *Id.* Schedule C. Many of the items on the list - *e.g.*, "Resin/glue reformulation," "Auxiliary feed screw installed," "Single head sander," "patchline," "Ramp for loading mulch" - hardly seem like the sorts of changes Congress had in mind when used the term "modification" as the statutory trigger for rigorous federal PSD review. *Id.* Schedule C at 1, 3, 9, 11, 14.[7]

The point here is not, as a policy matter, that more or less stringent controls are preferable. Rather, the point is that in the light of the Clean Air Act's federalism-respecting underpinnings, this Court should be slow to assume that Congress could possibly have intended to permit such a wholesale

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[6] 68 Fed. Reg. 61,272 (Oct. 27, 2003), *vacated*, *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006).

[7] Importantly, under petitioners' and EPA's view of the law (as articulated in the lower courts), these changes likely would *not* be exempt from PSD review under 40 C.F.R. §51.166(b)(2)(a)(iii)'s "routine maintenance, repair and replacement" exclusion. And therein lies the practical problem with petitioners' and EPA's arguments: They would make PSD applicable "to virtually any capitalized maintenance or repair project that prevented enough downtime to breach the emissions increase thresholds." *Alabama Power*, 372 F. Supp. 2d at 1297.

transfer of regulatory responsibility from the States to the federal government.

B. There Is a True Federalism7Respecting Solution Here: If a State Wants Stricter New7Source Con7trols, It Should Simply Enact Them.

The amici States backing petitioners and the EPA here invoke the value of federalism to support their positions. *See, e.g.*, NJ Br. 1, 5, 10; NY Br. 1. It is not, with respect, a notion of "federalism" with which we are familiar. It is, as we will show, federalism-in-reverse.

The genius of federalism, properly understood, is perhaps best captured by Justice Brandeis' famous "laboratory" metaphor: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *accord, e.g., United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring). In other words, federalism leaves States free to make tough social-policy decisions *for themselves*. As we will explain, the Clean Air Act accommodates - indeed, encourages - Brandeisian, laboratory-style federalism. But New York, New Jersey, *et al.*, seem to have a far more ambitious program in mind. Rather than making decisions *for themselves*, they want to upload their own notions of good environmental policy into federal law and thereby export them to *everyone else*. Whatever kind of solution that may be, it is not one that can be squared with - indeed, it is one that subverts - traditional federalism principles.

Petitioners' state amici's mistake, moreover, is not just one of terminology. New York's brief opens with a warning about the "dire ramifications" of emissions from "uncontrolled plants," which, it says, "kill tens of thousands of Americans annually and sicken hundreds of thousands of others." NY Br. 3. But that argument, with respect, is a straw man, as is any suggestion that affirmance here would

allow plants to "proceed without any scrutiny by the States." NY Br. 2. By its own express terms, the Clean Air Act sets only a *baseline* of protection. That is, it imposes *minimum* compliance requirements and explicitly invites States to tighten them as they see fit. As relevant here, §116 of the Clean Air Act unambiguously provides that -

> nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 7411 or section 7412 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

42 U.S.C. §7416. The message is clear: States may of their own accord adopt emissions limitations (here, PSD requirements) that are more rigorous than those established by federal law (here, the Clean Air Act's own PSD rules). *See Union Elec.*, 427 U.S. at 256-57 (Clean Air Act "subject[s] the States to strict minimum compliance requirements").

The point is simply that if any State at any time wants lower emissions caps or tighter permitting requirements, *it need only convince its Legislature to enact them and its Governor to sign them.* A few "courageous" States, *see New State Ice*, 285 U.S. at 311, of course, have had done just that. In 2002, North Carolina enacted its own "Clean Smokestacks Act," which requires coal-fired power plants to reduce emissions of NOx and SO_2 far more aggressively than federal law - by roughly three-quarters over a 10-year period. N.C. Gen. Stat. §143-215.107D(b)-(d). In addition, the Act specifies that the State's largest utilities "must achieve these emissions through actual reductions at their 14 power plants in the state - not by buying or trading emissions credits from utilities in other states, as allowed under federal regula-

tions." Sec. William G. Ross, Jr., N.C. Dep't of Env't and Nat. Resources, North Carolina's Clean Smokestacks Act, www.ncair.org/news/leg/cleanstacks.shtml. The North Carolina law is thus tougher than federal law on two counts and, indeed, is touted as going "beyond the requirements of the EPA's SIP call." *Id.*

More recently, Maryland, too, enacted a "Healthy Air Act." Md. Code. Ann. §2-1001 *et seq.* Over the course of the next decade, the Maryland law will reduce NOx emissions by 85%, SO_2 by 80%, and mercury by 90%. *See id.* §2-1002; Maryland Department of the Environment, Maryland Clean Power Rule: Frequently Asked Questions, www.mde.state.md.us/Air/md_cpr.asp. Like North Carolina's, Maryland's law prohibits "power plants from acquiring out-of-state emissions allowances (trading credits) in lieu of adding pollution controls locally." *Id.* Thus, like North Carolina's, Maryland's law is in two respects "stronger than current federal plans." *Id.* It means, so its proponents claim, "cleaner air in Maryland." *Id.*

Federalism, therefore, is working just the way the Framers - both of the Constitution and of the Clean Air Act – intended. If New York, for instance, wants to ensure that its own "efforts to prevent air quality from deteriorating" are not "undermine[d]" (NY Br. 1), it should simply redouble them. There are, to be sure, administrative and political costs to enacting tough environmental controls - they are, for better or worse, part of the calculus. What petitioners' state amici cannot do, consistent with the notion of federalism embodied in Clean Air Act §116 (or with any other meaningful notion of federalism, for that matter), is to seek to externalize those costs by free-riding a dubious interpretation of a federal regulation to their preferred policy outcome.[8]

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[8] Finally, if New York (or any other State) believes that emissions from sources in *other* States are contributing to a violation of its own air-quality

III. EPA's Litigating Position Has No Basis in the Real7 World Practicalities of Clean7Air Enforcement.

EPA's interpretation of the applicable PSD rule is, as we have said, not only illegal but also wildly impractical. We want to focus briefly on practicalities.

Again, according to EPA, the rigorous PSD permitting process is activated by any change to an existing source that recovers lost productivity and thereby (even without a corresponding emissions-rate increase or, indeed, despite an emissions-rate decrease) increases annual emissions. The problem, as we have explained, is that on EPA's view, nearly every change, however minor, qualifies, for the simple reason that nearly every repair of a damaged or deteriorating part will allow for an hours-of-operation increase and thereby - assuming constant, or even marginally reduced, rates of emission – result in an increase in annual emissions. Not only would that interpretation result in a breathtaking transfer of regulatory authority from the States to the federal government, but it would also impose a crippling burden both on industry and on the state regulators who would be tasked with its ground-level implementation.

Industry, of course, can speak for itself here. It is enough for our purposes to point out the obvious. Most plants have many units, and most units have many parts. Parts will go down - and thus require repair or replacement – at different and often unpredictable times. If, as our discussion of the Georgia-Pacific consent decree shows (*see supra* at 18), even relatively minor repair-and-replacement activities trigger the PSD review process, that process will go on ad infinitum. Imagine, for instance, that a section of tubes on hypothetical Boiler No. 1 goes down. PSD review is activated. Just as that section is set to emerge from the PSD process, a section on Boiler No. 2 (or perhaps even a different component part on No. 1) goes down, activating a new round of PSD review.

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standards, Clean Air Act §126 provides a specific statutory remedy. *See* 42 U.S.C. §7426.

Given the sheer number of moving parts in the typical plant (*see, e.g.*, the 994 "modifications" cited in Georgia-Pacific's case) and the amount of time it takes to conduct a proper PSD review and to issue a permit, *see, e.g., Alaska*, 540 U.S. at 516-17 (Kennedy, J., dissenting) ("[F]or a complex project, the time for approval can take from five to seven years."), it is easy to see that the reviews would in many instances overlap interminably, leaving plant operators in an inescapable regulatory Charybdis. (The problem would be exacerbated, of course, by the fact that PSD entails a *pre*-construction permit process; so the plant operator wouldn't even be able to begin fixing broken part No. 1 before it got the final green light from regulators, by which point there would probably be a broken part No. 2.)

Of greater and more immediate concern to us is the overwhelming burden with which EPA's interpretation would saddle state environmental regulators. Put simply, state agencies like ADEM would inevitably find themselves unable to keep up. The backdrop here, of course, is everything that state regulators already do. First, there is the development of the initial SIP, which must include (among other things) an EPA-approved PSD provision. *See* 42 U.S.C. §7475(a)(1). SIP development, as New Jersey quite correctly points out, is an "arduous" task. NJ Br. 6. After SIP development comes SIP implementation, which includes, among other things, the issuance to individual facilities of operating permits that specify those facilities' emission limitations and other compliance obligations. Then, there are the individual PSD applications that regulators process under the prevailing understanding of PSD requirements. Even on its less aggressive reading of the PSD rules, for instance, ADEM received, on average, 14 applications per year between 1997 and 2002 - each of which, as we have said, likely took quite some time to process. *See* Presentation: PSD Permit Applications Received by Region 4 (Calendar Year), Annual Joint EPA/State Enforcement Conference (Atlanta 2002).

Add to that the regulatory crush of EPA's sweeping PSD interpretation and the burden would become unsustainable.

Even after managing to educate themselves on the specifics of the new PSD standards, state environmental regulators would face a barrage of new permit applications concerning, among other things, glue reformulations and ramp additions. *See supra* at 18. They would then scramble, on the front end, to initiate dozens upon dozens of new reviews and then, on the back end, to prosecute each and every instance of noncompliance. Given their very limited resources, it is almost inconceivable that many States would be able to do the job, and, in any event, the explosion of bureaucracy would be mind-boggling.[9]

The point is that this case is *not* about increasing permitting loads at the margins. If Georgia-Pacific, for instance, had been obliged to undergo pre-construction review for each of its 994 alleged "modifications," the burden would have overwhelmed both the company and state regulators. The Clean Air Act, again, assigns front-line management responsibility to the States, and the PSD program particularly, given its complexity, indicates Congress' intent to structure an enforcement scheme that is sensitive to the needs and capabilities of state regulators. EPA's reading of the PSD rules is anything but. On its view, primary state control of Clean Air Act regulation would cease to be a "get to" and would become, instead, a "have to."

IV. EPA's Litigating Position Has Fundamental Drawbacks Even as a Matter of Environmental Policy.

We said at the outset that our disagreement with EPA here principally concerns the legality and practicality of its enforcement program, not the environmental policy underlying it. While that is true for the most part, there is an important caveat.

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[9] EPA itself has recognized that the very aggressive NSR/PSD interpretation that it is pursuing in these enforcement proceedings risks overtaxing the "scarce resources" of "State and local reviewing authorities" and that an hourly-rate-based reading would "reduce[] the reviewing authorities' compliance and enforcement burden." 70 Fed. Reg. 61,094 (Oct. 20, 2005).

This case, we should emphasize, does not pit white-knight clean-air advocates against greedy polluters. It's just not that simple. In fact, there are important countervailing consumer-related considerations to weigh against EPA's aggressive reading of the PSD rules, and, indeed, there are very good clean-air reasons to oppose that reading.

1. Initially, and perhaps most obviously, there is the issue of cost. There are two costs worth mentioning here. One, as Justice Kennedy has quite rightly recognized, "is the [permitting] process itself," which, he notes, can require an applicant to "spend up to $500,000." *Alaska*, 540 U.S. at 515-16 (Kennedy, J., dissenting). Another cost, far more significant in dollar terms, is the technology itself. Under the Clean Air Act's PSD provisions, a newly "constructed" (or "modified," *see* 42 U.S.C. §7479(2)(C)) source must ultimately be equipped with "best available control technology," or "BACT." 42 U.S.C. §7475(a)(4). BACT is, as its name implies, the latest and greatest. The price tag can run into the hundreds of millions of dollars per plant.

We have good reason to be concerned about cost, and it's not just because industry would have to spend more. Rather, we are concerned that industry will pass on its own increased costs to consumers in the form of higher, and in all probability *significantly* higher, product prices, monthly bills, and service fees.[10] Of course, as a generic matter, States have an interest in ensuring that their citizen-consumers can afford basic goods and services. Thus, we worry that if, for instance, even *non*-utility sources like saw, paper, and textile mills had to be retrofitted with BACT, the prices for the commodities those mills produce could skyrocket.

The States' interest here is even more acute because this case, like so many major PSD enforcement actions, involves

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[10] Alabama's PSC, for example, has authorized Alabama Power "to adjust monthly billings to recover" costs associated with "compliance with environmental laws, regulations, or other such mandates." Alabama Power Co. Petition for Adjustment of Rate CNP, *Order* at 1, Docket Nos. 18117, 18416 (Nov. 1, 2004).

a *utility*. That fact is significant in two related respects. First, utilities have a statutory duty to provide the consuming public with reliable service. *See, e.g.*, Ala. Code §37-1-49 ("Every utility shall maintain its plant, facilities and equipment in good operating condition .... Every utility shall render adequate service to the public and shall make such reasonable improvements, extensions and enlargements of its plants, facilities and equipment as may be necessary to meet the growth and demand of the territory which it is under the duty to serve."). In order to meet that responsibility, utilities *must* from time to time repair and replace deteriorating parts. Second, state Attorneys General have a statutory obligation to protect the interests of utility ratepayers. *See, e.g.*, Ala. Code §37-1-16(a) (Attorney General has authority to "intervene[e] in proceedings" before the PSC "on behalf of the using and consuming public" in matters pertaining to, among others, "rate applications, rate changes and curtailments of service").[11] The States' interest, in sum, is in ensuring that their citizens have access to utility services that are both *reliable* and *affordable*.

Accordingly, while clean air is a good, to be sure, it is not a good that can, consistent with competing notions of consumer protection, be pursued at all costs. *Cf. Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) ("[N]o legislation pursues its purposes at all costs."). Particularly given the multitude of *other* federal programs aimed at ensuring cleaner air (NSR/PSD, as the EPA seems to acknowledge here, is hardly the linchpin of the Clean Air Act's regulatory apparatus[12]), we think it quite likely that the harm brought

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[11] State Attorneys General take this obligation seriously and intervene on behalf of rate-payers routinely. *See, e.g.*, Alabama Power Co. Petition for Revised Rate ECR Factor, *Order* at 1, Docket No. 18148 (Dec. 15, 2005) (Attorney General intervened "to ensure that any rate increases are fair and equitable to the consumer").

[12] EPA Br. 12 n.3 (listing, among the "new programs that improve air quality," the Acid Rain Program, the NOx SIP Call, and the Clean Air Interstate Rule ("CAIR")). These new pollution-control programs, EPA has said, "are more efficient than major NSR" and will more than offset

on by EPA's enforcement-inspired reading of the PSD rules – particularly for low- and middle-income families, who may find themselves unable to afford next month's power bill – significantly outweighs the benefits.

2. More fundamentally, there are very good clean-air reasons to oppose EPA's position here. The sheer cost – in money, time, and labor – of such an expansive pre-construction permitting process, not to mention the installation of BACT at the culmination of that process, would create an irresistible incentive for industry simply to avoid repairs and replacements whenever and wherever possible, and to continue running plants on old, deteriorating, and *environmentally-unfriendly* components. Almost everyone has been down this road at least once: Your old car emits blue smoke, burns a quart of oil a month, and desperately needs its piston rings replaced. Your mechanic tells you that the job will run you $1800 and that, in any event, he can't do it for two weeks. What do you do? You just keep on driving, of course (and the blue smoke just keeps on pumping). It's simpler, and cheaper, to keep pouring oil into the car. So, too, here, rather than fixing broken parts – which under EPA's litigating position will trigger crippling expenses and production delays – industry players will just keep their plants running on inefficient, environmentally-unfriendly parts.

EPA itself has acknowledged that running plants on deteriorating parts is an invitation to environmental trouble. Indeed, *the whole point* of EPA's recent NSR-reform rulemaking initiative – part of which, of course, is to adopt prospectively the very position we advance here – has been to avoid encouraging plant owners to forego repairs in favor of continued operation using sub-par equipment. *See* 70 Fed. Reg. 61,083 (Oct. 20, 2005) (proposed rule adopting actual-to-actual emission test); 68 Fed. Reg. 61,248 (Oct. 27, 2003) (rule

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any marginal increase in emissions that might result from an hourly-rate-based reading of the NSR modification rules. 70 Fed. Reg. 61,088.

amending "routine maintenance" exclusion), *vacated, New York*, 443 F.3d 880. The reason, EPA has said, is that worn-out parts often lead to "periods of startup, shutdown, and malfunction," which themselves "usually" entail "increased emissions." *Id.* at 61,251. As EPA has explained the problem, because the NSR/PSD permitting process is "time-consuming and expensive" and "will likely result in a requirement to retrofit an existing plant with state-of-the-art pollution controls, which often is very costly and can present significant technical challenges," there is a very real risk that a plant owner "may forego or curtail replacements that would enhance the safe, reliable, or efficient operation of its plant." *Id.* at 61,250; 70 Fed. Reg. 61,093 (same verbatim). According to EPA, the solution - the sound environmental solution, that is - is to remove the "perverse" incentive for plant operators to limp by on deteriorating equipment. 68 Fed. Reg. 61,255; *accord* 70 Fed. Reg. 61,094 (object to "remove disincentives" to making changes that could, among other things, enhance "environmental performance").

The logic is compelling, and it applies precisely here. It is impossible to square with the very different, max-PSD policy that EPA is pursuing in these proceedings.

V. Section 307(b) Does Not Preclude Enforcement7 Proceeding Targets From Defending by Challenging EPA's Application of Clean Air Act Rules.

For two reasons, it seems to us clear that Section 307(b)'s jurisdictional provision has no application here.

1. First, there is the plain text of the statute. Section 307(b)(1) requires that "petition[s] for review" challenging (1) "promulgat[ions]" of "nationally applicable regulations" and (2) other "final action[s]" of EPA be filed in the D.C. Circuit. 42 U.S.C. §7607(b)(1); *accord id.* §7607(e) (§307(b) pertains to "regulations," "orders of the Administrator"). Section 307(b)(2) then states that any action "with respect to which review could have been obtained" in a §307(b)(1) petition for review shall not be subject to "judicial review" in an enforcement proceeding. *Id.* §7607(b)(2). The question,

therefore, is whether Duke's defensive argument that EPA had misapplied the preexisting 1980 PSD rule would have been proper under §307(b)(1).

It would not have been. A civil enforcement proceeding, of course, is not a "petition for review" within the meaning of §307(b)(1). No "promulgat[ion]" of any "regulation" is being questioned here; the pertinent "regulation" here was "promulgated" in 1980. Nor can EPA's current interpretation (qua DOJ litigating position) concerning the 1980 regulation appropriately be considered a "final action." Final agency action, of course, has a stylized meaning in the administrative-law context; to qualify, an agency's pronouncement must, at a minimum, "'mark the consummation of [its] decisionmaking process.'" *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 478 (2001) (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)). Particularly given EPA's flip-flopping interpretations of the 1980 PSD rule, its current litigating position surely does not make the grade.

Petitioners' and their amici's jurisdictional analysis is, with respect, based on a caricature of §307(b) rather than on a careful reading of its language. New Jersey, for instance, asserts at one point that Congress "demand[ed]" in §307(b) that "the federal minimum requirements" be reviewed exclusively via petition for review in the D.C. Circuit. NJ Br. 8. But that is not at all what §307(b) says; it speaks, instead, solely in terms of "promulgat[ions]," "regulation[s]," and "final action[s]." Edging closer to §307(b)'s text, EPA and other amici stake their argument on the assertion that the Fourth Circuit's decision here "*effectively* invalidates the PSD regulations" themselves and thus triggers §307(b). EPA Br. 29, 31 (emphasis added); *see also, e.g.*, NY Br. 4 ("effectively invalidates"). That argument saddles the adverb with more than it can bear. It depends on the premise that there is only one reading of the PSD regulation that is even plausible – namely, to require PSD review based solely on activity that causes an hours-of-operation increase – and concludes that any disagreement with *that* reading renders the regulation itself a dead letter. As we have shown, however, any

current assertion that the rule *must* be understood to incorporate an hours-of-operation trigger is in the teeth of EPA's own vacillation on the issue. At the end of the day, the fact remains that Duke's argument here comes in defense to an enforcement action that EPA itself initiated in North Carolina. Duke's defense entails only a challenge to EPA's application of the 1980 PSD rule to it, not a frontal assault on the validity of the 1980 rule itself. This is not a §307(b) case.

2. Plain language aside, petitioners' and EPA's reading of §307(b) would beget either grave unfairness, judicial chaos, or both. It simply cannot be the law that where, as here, EPA institutes a civil-enforcement proceeding in a local district court, the targeted defendant is left with the Hobson's choice of either (1) rolling over, not defending itself, and accepting an adverse judgment or (2) instituting an entirely separate and parallel action in the D.C. Circuit. Surely, instead, when EPA itself decides to bring suit against a plant operator in Alabama, for instance, that operator is entitled to defend itself in Alabama, without cluttering the court system with a duplicate action in Washington, D.C. *Cf. Adamo Wrecking Co. v. United States*, 434 U.S. 275, 285 (1978) (§307(b) does not prevent criminal-enforcement target from defending itself, so long as court does not invalidate EPA's "promulgat[ion]" or the "regulation" itself).

The point is that any anti-forum-shopping policy that might underlie §307(b), *see* EPA Br. 18, has absolutely no application to an enforcement-action *target* like Duke. Here, by contrast, the shoe is on the other foot. Recently, in *Alaska*, this Court emphasized that EPA may *not* seek to "achieve an unfair advantage through its choice of litigation forum." 540 U.S. at 493. Petitioners' and EPA's casual reading of §307(b) – which allows EPA to sue but forbids the target to defend – would encourage EPA to do just that.

CONCLUSION

For the foregoing reasons, this Court should affirm the court of appeals' judgment.

Respectfully submitted,

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[The following declaration was filed in *United States v. Alabama Power Co.*, 372 F.Supp.2d 1283 (N.D. Ala. 2005).]

DELARATION OF RICHARD E. GRUSNICK

1. My name is Richard E. Grusnick. I am over 21 years old, am competent to testify, and have personal knowledge of the facts set forth in this declaration. In connection with making this declaration, I have reviewed a number of documents from the Alabama Department of Environmental Management ("ADEM") and the U.S. Environmental Protection Agency ("EPA") to refresh my recollection. These are documents that were generated in the ordinary course of these agencies' work and it was the practice and procedure of the agencies to retain these documents. The ones I found most relevant to my testimony are attached. I also have reviewed the complaint and other filings in United States v. Alabama Power, as well as the opinions and filings in other recent EPA litigations involving similar issues.

2. I was employed by the agency responsible for air pollution control in Alabama for 28 years, from June 1970 through September of 1998, when I retired. I served as the Deputy Director of ADEM from 1996 to 1998. In that capacity, I assisted the ADEM Director in managing the state's efforts for implementing air, water, and waste management programs. From 1982 to 1996, I was the Chief of ADEM's Air Division. In that capacity, I directed the state's efforts to manage air quality within Alabama. These efforts included oversight of the processing of permit applications; development and implementation of new regulatory requirements; interpretation of all ADEM air regulations; enforcement actions; and complaint investigations. The Air Division assumed the responsibilities of the Alabama Air Pollution Control Commission ("AAPCC") in 1982. At that time, I was Director of AAPCC, having been appointed to that position in the same year. From 1974 to 1982, I was Assistant Director of AAPCC, and from 1970 to 1974, I served as an environmental engineer with the AAPCC. (From this point

forward, my references to "ADEM" should be understood to include AAPCC for matters predating ADEM's creation.)

3. My work at ADEM was closely associated with Alabama's program to regulate air pollution from the program's inception until my retirement in 1998. ADEM first adopted regulations to implement a state-wide air pollution control program in Alabama in January of 1972, and I took part in developing those regulations. EPA approved Alabama's initial State Implementation Plan ("SIP") on May 31, 1972. ADEM adopted additional state air regulations that became a part of the SIP after that time, cluding Alabama regulations implementing the 1977 Clean Air Act's Prevention of Significant Deterioration ("PSD") program and the Non-Attainment New Source Review program (collectively called the "NSR programs"). I participated in and supervised ADEM's efforts to seek and obtain EPA approval for these regulations, including direct participation through personal communications and meetings with EPA staff. Further, I participated in and supervised the issuance of permits pursuant to the NSR programs, and I participated in and supervised ADEM's enforcement of those permits.

4. Alabama followed state rulemaking procedures to adopt state PSD regulations rather than accept delegated authority from EPA to implement and enforce the federal regulations. The principal reason for taking this approach was the desire to retain primacy over efforts to manage air quality within the state. It was my belief and understanding that using state-adopted regulations, which were subsequently approved by EPA for inclusion in the SIP, would provide greater flexibility and deference to the state's interpretation of the requirements than if the state were to operate a delegated program. A memorandum dated June 11, 1984, from EPA Assistant Administrator for Air and Radiation to the EPA Regional Administrator (Attachment 1) confirms my understanding of the deference extended by EPA to the state in the interpretation of the state's own regulations.

5. ADEM adopted state regulations to implement the state's PSD permitting program on January 27, 1981. These regulations became the basis for implementing the PSD program in Alabama. Effective December 10, 1981, EPA approved these regulations.

6. Under Alabama's PSD program, major sources of air admissions in areas with air quality better than standards ("attainment areas") must obtain a PSD permit prior to certain construction activities. This requirement applies to the construction of a new source as well as to construction of a major modification at an existing source.

7. ADEM did not require the owner or operator of a source to seek an "applicability determination."

8. ADEM interpreted the phrase "major modification" in its regulations such that the PSD permitting requirement applied only to a project or activity intended to make the existing unit or facility physically bigger, that is, one that would increase unit capacity. A project or activity intended to fix the components and parts of an existing source was not considered by ADEM to be a major modification. Replacing deteriorated or malfunctioning parts to restore or return an existing unit or facility back to its normal or permitted operations was not considered a major modification.

9. Existing sources were generally permitted at a certain hourly capacity and/or set of operating conditions. Either way, ADEM did not view upkeep or repairs which promoted the expected operations at these sources as major modifications. Rather, ADEM focused on the maximum hourly rate of emissions. Only if the maximum hourly rate of emissions increased as the result of a project or activity could the activity potentially trigger PSD requirements. This was how ADEM applied the production rate and hours of operations exclusion in the state's regulations. Only activities which caused an increase in the maximum hourly emission rate would have then triggered as evaluation of the routine maintenance, repair and replacement exclusion or the evaluation of the net emissions at the plant as a whole.

10. The definition of "major modification" in Alabama's PSD regulations has not changed substantively since its original adoption in 1981.

11. ADEM did not interpret the Alabama PSD rules in way that would require PSD preconstruction permitting for projects or activities on the basis of increased availability or utilization of a facility, rather than first determining if there was an increase in the maximum hourly rate of emissions.

12. I do not recall any suggestion from any EPA official that the exclusion for routine maintenance, repair and replacement should be determined with reference to what is routine at a specific unit, plant or facility. I can recall no EPA directive or guidance from my time of service at ADEM indicating a policy of applying such a standard rather than an industry-wide standard. I recall no EPA directive or guidance from my time at ADEM suggesting that "major modification" or the exclusion for routine maintenance, repair, or replacement should be determined with reference to the absolute cost of the project, the accounting treatment of project costs (for example, as capital costs or expenses), or the employment status of personnel carrying out the project (for example, as employees or contractors).

13. ADEM utilized many techniques to insure that the requirements of its regulations were satisfied, including inspections, review of plant records, requiring periodic reports from the regulated community, and direct personal communications between ADEM staff and representatives of the plant. An on-site inspection of each major plant in the state was conducted at least once per year. During these inspections, maintenance, repair, and replacement activities often would be observed.

14. ADEM was aware that Alabama Power and other sources undertook projects similar or comparable to those named in the complaint and even some of those very projects. In my preparation for this declaration, I identified documentation of the following specific examples:

a. Attachment 2 includes reports of two unannounced inspection for Alabama Power Company's E.C. Gaston Stem Plant which indicate that Unit 5 was out of service for scheduled maintenance during the course of inspections. The report, dated April 15, 1991, concerns an inspection conducted on April 8, 1991, which appears to be during the time of one of the Gaston projects which is the subject of this litigation.

b. Alabama Power Company approached ADEM in February of 1984 to discuss alternative opacity monitoring procedures to be used while converting Unit 10 to a balanced draft system. Attachment 3 includes a memorandum of the meeting and follow-up correspondence regarding this issue. The Unit 10 conversion appears to be one of the projects which are the subject of this litigation. It is clear that Alabama Power was not attempting to hide this conversion.

15. Based on my experience, industrial facilities in this state, including electric utilities, are continuously performing maintenance, repairing or replacing components that wear out, and otherwise undertaking the steps necessary to maintain their operations. ADEM did not view these actions as triggering a PSD review, not did EPA ever suggest otherwise while I was at ADEM.

16. EPA had oversight responsibility to ensure that the state program satisfied the requirements of the Clean Air Act. EPA would periodically issue policy memoranda which would provide EPA's guidance on major air program policy issues. These were internal EPA documents which underwent no public notice but were intended to influence how state programs would be implemented. Several of these memoranda dealt with the PSD program. However, EPA did not communicate to ADEM the interpretations of PSD preconstruction permitting requirements that it advances in its NSR cases against other utilities and, apparently, against Alabama Power. To the contrary, contemporaneous EPA guidance documents offered no hint of these interpretations, in spite of numerous opportunities to do so.

Among the documents issued by EPA over the years are the following:

a. EPA periodically made efforts to influence implementation of the PSD program. One of the more comprehensive efforts was undertaken by Craig Potter, EPA's Assistant Administrator for Air and Radiation. He created a New Source Review task force on June 27, 1986, which prepared a Final Draft Report in December of 1986 (Attachment 4). This report addresses numerous problems in the implementation of the NSR programs, but it does not promote the interpretations suggested by EPA.

b. Based on the findings of the task force, Mr. Potter issued a memorandum to the EPA Regional Administrators on December 1, 1987, entitled "Improving New Source Review (NSR) Implementation" (Attachment 5). The stated purpose of the memo was to establish "certain program initiatives designed to improve the timeliness, certainty, and effectiveness of these programs." The memorandum dealt with threshold applicability issues as well as implementation of the requirements once it was clear PSD applied. Among other things, the memorandum set up a system for EPA oversight of PSD permits, created a new method for determining best available control technology (top down BACT) for sources subject to the requirement, promised to improve training , and promised to improve guidance development and distribution. The memorandum also encouraged the Regional offices to "review minor permit actions which exempt an otherwise major source or modification from a major review (*e.g.*, 'synthetic' minor sources)." This minor source permit issue was a threshold applicability question. Specifically, sources could avoid a PSD review if they accepted emission limits which were less than the thresholds established by the regulations. EPA apparently had developed concerns that this approach for avoiding a

PSD review had not been properly implemented. Neither the report nor the memorandum made any mention of sources improperly avoiding PSD reviews for modifications.

c. EPA issued a lengthy New Source Review Workshop Manual in October of 1990. Despite extensive guidance comprising over 300 pages on such issues as BACT, synthetic minor sources, and emission netting, the Manual devotes less than two pages to the implementation of the exclusions from "physical change" (such as routine maintenance, repair, and replacement), and it offers not suggestion of EPA's current positions on this subject.

17. EPA had numerous, regular opportunities to identify ADEM's policies and offer suggestions in the event it disagreed with ADEM on a point of interpretation. During my tenure as Chief of the Air Division, EPA would usually conduct an annual on-site audit of ADEM's Air Program. The audits generally included a mid-year review where Regional EPA staff members would visit ADEM, meet with staff, perform file reviews of individual plants, and review other records. Further, EPA had a mechanism to strongly encourage ADEM agreement with or acquiescence to its established policies. The federal grant process included an annual negotiation of commitments between EPA and the state. EPA would routinely identify the outputs or topics it considered high priority (often based on EPA headquarters' guidance) and negotiate commitments from ADEM. Over the years, EPA identified several PSD related outputs that it wished included in ADEM's grant commitments. These included commitments to implement top down BACT and to provide EPA copies of synthetic minor source permits.

18. No audit or grant discussion ever targeted implementation of the modification provisions of the PSD regulations consistent with EPA's current interpretation as set forth in EPA's other NSR enforcement cases or this case, and I do not recall this topic ever being an issue identified during an audit.

19. ADEM's non-NSR air permitting requirements generally were not applied to projects at major sources if they did not trigger an NSR review.

20. I have been retained as a consultant in this case. I am being compensated for my consulting time at my standard rate of $150 per hour.

Pursuant to 28 U.S.C. Section 1746, I declare under penalty of perjury that the foregoing is true and correct.

[/s/ Richard E. Grusnick 10/7/04]
Richard E. Grusnick

[The following declaration was filed in *United States v. Alabama Power Co.*, 372 F.Supp.2d 1283 (N.D. Ala. 2005).]

DECLARATION OF RONALD W. GORE

1. My name is Ronald W. Gore. I am over 21 years of age, I am competent to testify, and I have personal knowledge of the facts set forth in this affidavit. I have reviewed the complaint and other pleadings filed in the case of United States of America v. Alabama Power Company. I have also reviewed a declaration signed by Mr. Richard Grusnick relating to this case and to certain provisions of the Alabama SIP, and I find it consistent with my own views.

2. I am the current Chief of the Air Division of the Alabama Department of Environmental Management ("ADEM"). I have served in that position from 1996 to the present time. From 1976 to 1996, I served as the Chief of the Air Division's Engineering Services Branch. As Air Division Chief, I am responsible for managing and overseeing Alabama's air quality program. This position is the highest-ranking state official dealing exclusively with air quality. I report directly to the ADEM Director, and I am responsible for developing air quality regulations and policies, interpreting ADEM's air regulations, and permitting and enforcement.

3. ADEM's air quality regulations include those that implement the prevention of Significant Deterioration ("PSD") program in Alabama. ADEM's PSD regulations have been in effect since January 27, 1981, and were approved by the United States Environmental Protection Agency ("EPA") on December 10, 1981. Since that time, ADEM has operated the PSD program in Alabama in lieu of the federal PSD program, as provided under the Clean Air Act. The interpretations of ADEM's PSD preconstruction permitting regulations, discussed below, were the interpretations of the agency at the time of the projects identified in the complaint.

4. Under Alabama's PSD program, major sources of air emissions in attainment areas must obtain a PSD permit prior to the construction of a major modification.

5. For purposes of this PSD permitting requirement, ADEM interprets "major modification" to include only those projects or activities that increase the maximum capacity of a unit or facility to emit more pollution on an hourly basis. However, not every project that increases the unit's or facility's hourly emissions rate will trigger PSD. For example, the source may still be able to net out of PSD applicability. This interpretation is based on the exclusions contained in the Alabama regulations and on the Clean Air Act. Under ADEM's interpretation, repairing or replacing like-kind parts or components at an existing source is not a major modification, nor is a project that is intended to restore the unit or facility to its normal or expected level of operations.

6. The Alabama PSD regulations contain an exclusion for routine maintenance, repair, and replacement activities. This exclusion was intended to make clear that repair, replacement and maintenance activities that are ordinary practice for facilities in the relevant industrial category, such as the replacement of worn-out equipment with like-kind or comparable components, are not considered modifications.

7. The Alabama PSD regulations contain exclusions for increases in hours of operation and for increases in production rate. These exclusions were intended to make clear that a project or activity that is followed by an increase in the availability or utilization of a facility is not considered a modification on that basis, rather than on the basis of an increase in the maximum hourly rate of emissions.

Pursuant to 28 U.S.C. Section 1746, I declare under penalty of perjury that the forgoing is true and correct.

[/s/ Ronald W. Gore 10/8/04]
Ronald W. Gore
Chief, Air Division
Alabama Department of
Environmental Management

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IV
345 Courtland Street
Atlanta, Georgia 30365

[JUL 12, 1982]

[JULY 15, 1982 RECEIVED AIR POLLUTION]

REF: 4AW-AM

TO ALL STATE AND LOCAL AGENCY DIRECTORS:

During the recent mid-year audits of the State air agencies, it was suggested that EPA Region IV prepare a quarterly summary of items of interest to State and local new source review staff, and distribute it to air pollution control agencies in Region IV. Such a summary would include recent policy decisions, interpretations of EPA regulations, BACT determinations of special interest, and any other items which would be of interest to new source review personnel.

This letter is the first such summary. Future summaries will be sent to you approximately each quarter. If you have any questions regarding this letter, please notify Roger Pfaff directly.

I. CMA Agreement:

When EPA promulgated changes to the EPA PSD and nonattainment regulations (8/7/80) in response to the Alabama Power court decision, it was sued by several industrial groups. The suit is referred to as the CMA suit (Chemical Manufacturers Association). On February 22, 1980, EPA and the litigants reached an agreement on all the issues. Under separate cover, each state agency is be-

ing sent a copy of the agreement. EPA agreed to propose two sets of revisions to the EPA new source review regulations. Some of the major proposals will be:

1) No fugitive emissions will count in determining applicability to the regulation.

2) Limitations do not have to be federally enforceable to count as restrictions.

3) The netting baseline for modifications will be either the actual emissions (the present rule) or potential emissions, whichever is more favorable to the source, except that if potential is used, it must be the hourly potential, not the yearly potential. This change would allow a source whose potential is higher than is actual to build new units and increase actual emissions without being subject.

4) For nonattainment review, the offset baseline will be either actual or potential emissions, as described above, so long as RFP is met.

II. Capable of Accommodating Definition

Fuel switches at boilers are exempted from PSD if the source (i.e., plant) is "capable of accommodating" the new fuel. EPA's policy regarding whether an individual boiler is capable of accommodating a fuel is somewhat well established, but whether an entire plant is capable of accommodating is open to interpretation. For example, if an oil fired boiler can burn coal, but no coal handling equipment is in place, is the entire plant capable of accommodating coal? Region IV has requested an official policy determination on this issue from EPA Headquarters. Based on a previous policy determination, un-

der the 1978 PSD regulations, one could conclude that the increased emissions from a coal-accommadative boiler would not trigger review, but if the increased emissions from the coal handling equipment were significant (25TPY TSP at a major source) the coal handling equipment would be subject to PSD. (See PSD determination 84 in EPA's "Summary of PSD Determinations" from Edward E. Reich).

As soon as we receive an updated answer on this question, we will let you know.

III. BACT/LAER Clearinghouse

You may be aware that EPA's Office of Air Quality Planning and Standards has been reworking the format of the BACT/LAER Clearinghouse to provide for a computerized output. That project is now complete, and each participating State and Local Agency should have received the first copy of the computerized Clearinghouse report. Success of future issues depends upon your submittal of future determinations, so please make a continued effort to keep the Clearinghouse up-to-date.

IV. Questions and Answers

Question: Do 52.21(k) and (o) apply to pollutants emitted in less than significant amounts?

Answer: Yes.

Question: Some pollutants were not regulated by PSD before March 1978. In counting contemporaneous increases as decreases, do emissions before that date count?

Answer: Yes. Any pollutant now regulated by the Act is treated equally, even if the pollutant was only recently regulated.

Question: A source to be modified will be subject to PSD due to a significant increase in SO_2 emissions. After the modification there will be no increase in the hourly particulate emissions. The source presently operates at 4,000 hours per year. If the PSD permit would allow 7,000 hours per year, would this be judged a significant increase in particulate emissions, and cause the source to be subject to PSD for particulate?

Answer: No. Since the modification does not cause any increase in emissions, no increase in annual emissions should be calculated.

Question: A source obtained a PSD permit for a new oil-fired boiler in 1977. The boiler is operating now. The owner wishes to convert the boiler to coal. There will be less than a significant increase in actual emissions of each pollutant. Is the conversion subject to PSD?

Answer: No. The conversion would be treated just like a replacement. The fact that the boiler is subject to PSD permit is presently immaterial. But, the new emission limits must be made federally enforceable and represent a less than significant increase over present actual emissions. Also, do not overlook NO_x, CO, lead, Hg, Be.

Question: An existing major source replaces a kiln with an identical new kiln. At the same time, a new boiler is added. If the new kiln is proposed to emit the same rates of pollutants as the existing kiln, but the boiler emits significant amounts of those pollutants, is the new kiln subject to BACT?

Answer: Yes. If the actions are taken at the same time, BACT would apply to both units, since a net increase would result at each unit. [52.21(j)(3)]

Sincerely yours,

[/s/ for]
James T. Wilburn, Chief
Air Management Branch
Air & Waste Management Division

ALABAMA
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

April 8, 1996

Mr. Winston Smith, Director
Air Pesticides & Toxics
Management Division
EPA Region IV
345 Courtland Street, N.E.
Atlanta, GA 30365

Dear Mr. Smith:

Please find enclosed a signed copy of the Alabama/EPA Compliance Assurance Agreement. A copy with your signature was sent to us in a letter from you dated March 20, 1996.

I appreciate your staff's cooperation in making this agreement a workable document.

If you have any questions, please give me a call at (334) 271-7861.

Sincerely,

[/s/ Richard E. Grusnick]
Richard E. Grusnick, Chief
Air Division

REG:pkb

Enclosure

ALABAMA/EPA COMPLIANCE ASSURANCE AGREEMENT

I. INTRODUCTION

The purpose of this agreement is to enhance the effectiveness of the combined state and EPA Air Compliance and Enforcement Program. This agreement presents by reference and/or attachment hereto, the guidance which serves as the basis for implementation of the air enforcement/compliance program in Alabama. The state or local basis may vary for different state and local agencies (S/Ls); however, the EPA basis is consistent throughout the S/Ls. This agreement supports the enforcement efforts of the Alabama Department of Environmental Management (ADEM), while strengthening the enforcement partnership with EPA.

This Agreement will be reviewed annually and updated as necessary.

II. STATE/EPA COMMITMENTS

The state and EPA will implement the Clean Air Act (CAA), and related state or federal regulations in a consistent manner throughout the regulated community.

This agreement serves as the EPA and state guide to ensure that their collective enforcement efforts pursue similar goals and results. We will seek continuous environmental improvement and consistent compliance within the regulated community. To ensure our success, we will coordinate our effort as follows:

A. Share inspection plans and procedures for preparation of the plans; seek to resolve any conflicts prior to implementation of the plans; coordinate any changes to the plans.

B. Take joint state/EPA actions, particularly where a state is moving to correct a violation but does not have necessary authorities or resources.

C. EPA will discuss with the state and consider sharing credit in cases where national issues dictate EPA as

lead agency, or when the state and EPA jointly determine that for exceptional reasons EPA should be the lead agency. This sharing of credit may be accomplished by issuance of joint press releases.

D. The state and EPA will establish a process for resolving disputes, especially differences in interpretation of regulations or program goals as they may affect resolution of individual instance of non-compliance.

E. ADEM and EPA will begin again to conduct monthly conference calls as means of ensuring that we maximize effectiveness by sharing information regarding ongoing and planned enforcement activities. The calls shall focus on priority cases. The first call will occur in late February 1996 and will focus on the status of priority cases as of January 31, 1996. EPA will insure that the appropriate level of personnel will participate in the calls, that the information ADEM sent in the monthly package has been reviewed, and that information on the status of cases EPA is involved in or is considering being involved in is up-to-date. By the last day of each month, EPA will mail to ADEM a copy of its case-tracking printout, updated to the end of the previous month.

F. The state and EPA will rely on existing guidance and practices for establishing time frames to ensure that there is timely and appropriate enforcement response to violations. Time frames established by existing guidance will be considered as trigger points and not as absolute deadlines. The time frames will be viewed as key milestones to be used to manage the program by providing general targets to strive for in good program performance; trigger review of progress in enforcement cases; and a presumption of where EPA may take direct enforcement action after consultation with the state.

G. The state will inform EPA of proposed penalty levels though the monthly submittal and the conference call

as soon as a proposed amount has been arrived at within ADEM. Any input into ADEM's planned response to a violation should be provided as soon as possible after EPA becomes aware of the circumstances. EPA will use EPA's BEN model to determine reasonableness of penalties sought through EPA, state or joint EPA/state enforcement actions. When the state and EPA cannot arrive at a mutual penalty, the disputes resolution process established in E., above will be adhered to. If resolution of the penalty amount cannot be reached, EPA retains the right and responsibility to overfile.

H. EPA will continue to perform inspections in the state, averaging between one to three percent of the major sources in the state on an annual basis. The frequency and number of inspections may be reduced or increased pending the development of criteria and measures for defining good program performance or success. EPA will also continue to perform multimedia inspections. The frequency and number of these inspections will be predicted on an annual basis. The "lead" agency in resolving federally-enforceable violations discovered during these inspections will be discussed with the state, and a determination made as to which agency is better suited to resolve said violations. If a determination cannot be made, EPA and the state mutually agree to apply the dispute resolution process as identified in E., above.

COMPLIANCE ASSURANCE AGREEMENT

Region 4, U.S. Environmental Protection Agency, Air, Pesticides and Toxics Management Division and the Alabama Department of Environmental Management, agree to the following operating criteria for enforcement of federally-delegated air regulations. This agreement applies beginning with the latest signature date below, until October 1, 1996, or until such time as the parties agree to revisions of this agreement. By agreeing to the criteria set forth in this agreement, the signatory parties confirm the significance of enforcement of environmental laws and regulations and the need to cooperate effectively and efficiently in their implementation.

[/s/ Richard E. Grusnick] — [4/8/96]
Richard E. Grusnick, Chief — Date
Air Quality Division
Alabama Department of Environmental Management

[/s/ for] — [March 20, 1996]
Winston A. Smith, Director — Date
Air, Pesticides and Toxics Management Division
U.S. Environmental Protection Agency - Region 4

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(4)

No. 05-848

FILED

JUL 21 2006

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

ENVIRONMENTAL DEFENSE, et al.,

Petitioners,

v.

DUKE ENERGY CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR AMICI CURIAE AMERICAN LUNG ASSOCIATION, AMERICAN THORACIC SOCIETY, AMERICAN ASSOCIATION FOR CARDIOVASCULAR AND PULMONARY REHABILITATION, NATIONAL ASSOCIATION FOR THE MEDICAL DIRECTION OF RESPIRATORY CARE, AND AMERICAN COLLEGE OF CHEST PHYSICIANS IN SUPPORT OF PETITIONERS

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FEDERAL CASES

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New York v. U.S. Environmental Protection Agency, 413 F.3d 3 (D.C. Cir. 2005) 3, 22

Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990) 23

FEDERAL STATUTES

42 U.S.C. § 7401 (2004) 22, 25

42 U.S.C. § 7403 (2004) 5

42 U.S.C. § 7411 (2004) 22

42 U.S.C. § 7470 (2004) 22, 26

FEDERAL REGULATIONS

40 C.F.R. § 51.166(b) (2005) 23

40 C.F.R. § 60.14(a) (2005) 23

National Ambient Air Quality Standards for Nitrogen Dioxide: Final Decision, 61 Fed. Reg. 52,852 (October 8, 1996) (codified at 40 C.F.R. § 50) 15

National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856 (July 18, 1997) (codified at 40 C.F.R. §§ 50.9, 50.10) 1

National Ambient Air Quality Standards for Particulate Matter, 71 Fed. Reg. 2,620 (proposed Jan. 17, 2006) (to be codified at 40 C.F.R. § 50) 2

TABLE OF AUTHORITIES – Continued

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OTHER SOURCES

Abt Associates, Inc., *The Particulate-Related Health Benefits of Reducing Power Plant Emissions* (October 2000), *available at* http://www.abtassociates.com/reports/particulate-related.pdf 20, 21

Alexandros Gryparis et al., *Acute Effects of Ozone on Mortality from the "Air Pollution and Health: A European Approach" Project*, 170 Am. J. Respir. & Crit. Care Med. 1080 (2004) 12

American Academy of Pediatrics, Committee on Environmental Health, *Ambient Air Pollution: Health Hazards to Children*, 114 Pediatrics 1699 (2004) 6

American Lung Association, *Health Effects of Outdoor Air Pollution* (1996) 16

Andrew Churg et al., *Chronic Exposure to High Levels of Particulate Air Pollution and Small Airway Remodeling*, 111 Envtl. Health Persp. 714 (2003) 9

Andrew J. Ghio et al., *Concentrated Ambient Air Particles Induce Mild Pulmonary Inflammation in Healthy Human Volunteers*, 162 Am. J. Respir. & Crit. Care Med. 981 (2000) 9

Antonella Zanobetti & Joel Schwartz, *Are Diabetics More Susceptible to the Health Effects of Airborne Particles?*, 164 Am. J. Respir. & Crit. Care Med. 831 (2001) 10

TABLE OF AUTHORITIES – Continued

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Antonella Zanobetti & Joel Schwartz, *The Effect of Particulate Air Pollution on Emergency Admissions for Myocardial Infarction: A Multicity Case-Crossover Analysis*, 113 Envtl. Health Persp. 978 (2005) 8

Antonella Zanobetti et al., *The Temporal Pattern of Respiratory and Heart Disease Mortality in Response to Air Pollution*, 111 Envtl. Health Persp. 1188 (2003) 8

Audrey Galizia & Patrick L. Kinney, *Long-term Residence in Areas of High Ozone*, 107 Envtl. Health Persp. 675 (1999) 12

Blanka Binková et al., *The effects of air pollution on children's health and development: a review of the evidence*, WHO Regional Office for Europe (2004), *available at* http://www.euro.who.int/document/EEHC/execsum.pdf 5

C. Arden Pope III et al., *Cardiovascular Mortality and Year-round Exposure to Particulate Air Pollution: epidemiological evidence of general pathophysiological pathways of disease*, 109 Circulation 71 (2004) 9

C. Arden Pope III, *Epidemiology of Fine Particulate Air Pollution and Human Health: biological mechanisms and who's at risk?*, 108 Envtl. Health Persp. 713 (2000) 9

C. Arden Pope III et al., *Lung Cancer, Cardiopulmonary Mortality, and Long-Term Exposure to Fine Particulate Air Pollution*, 287 J. Am. Med. Ass'n 9 (2002) 9

TABLE OF AUTHORITIES – Continued

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C. Arden Pope III et al., *Particulate Air Pollution and Daily Mortality on Utah's Wasatch Front*, 107 Envtl. Health Persp. 567 (1999) 7

C. Arden Pope III et al., *Particulate Air Pollution as a Predictor of Mortality in a Prospective Study of U.S. Adults*, 151 Am. J. Respir. & Crit. Care Med. 669 (1995) 8

California Environmental Protection Agency, Air Resources Board, *Recent Research Findings* (2004), *available at* http://www.arb.ca.gov/research/health/fs/pm-03fs.pdf 18

Committee of the Environmental & Occupational Health Assembly of the American Thoracic Society, *Health effects of outdoor air pollution*, 153 Am. J. Respir. & Crit. Care Med. 3 (1996) 12, 13

Daniel Krewski et al., *Reanalysis of the Harvard Six Cities Study and the American Cancer Society Study of Particulate Air Pollution and Mortality* (Health Effects Institute 2000) 8

Daniela D'Ippoliti et al., *Air Pollution and Myocardial Infarction in Rome: a case-crossover analysis*, 14 Epidemiology 528 (2003) 8

David V. Bates, *Ambient Ozone and Mortality*, 16 Epidemiology 427 (2005) 12

Donald Horstman and Lawrence J. Folinsbee, *Sulfur dioxide-Induced Bronchoconstriction in Asthmatics Exposed for Short Durations under Controlled Conditions: A Selected Review, in Susceptibility to Inhaled Pollutants* (M. Utell & R. Frank eds., 1989) 16

TABLE OF AUTHORITIES – Continued

Page

Douglas W. Dockery et al., *An Association Between Air Pollution and Mortality in Six U.S. Cities*, 329 New Engl. J. Med. 1753 (1993) 8

Douglas W. Dockery et al., *Change in Pulmonary Function in Children Associated with Air Pollution Episodes*, 32 J. Air Pollution Control Ass'n 937 (1986) 17

Francesca Dominici et al., *Airborne Particulate Matter and Mortality: timescale effects in four US cities*, 157 Am. J. Epidemiology 1055 (2003) 8

Francesca Dominici et al., *On the Use of Generalized Additive Models in Time-Series Studies of Air Pollution and Health*, 156 Am. J. Epidemiology 193 (2002) 7

Frank D. Gilliland et al., *The Effects of Ambient Air Pollution on School Absenteeism Due to Respiratory Illness*, 12 Epidemiology 43 (2001) 18

Gary Norris et al., *An Association Between Fine Particles and Asthma Emergency Department Visits for Children in Seattle*, 107 Envtl. Health Persp. 489 (1999) 10

George D. Thurston & David V. Bates, *Air Pollution as an Underappreciated Cause of Asthma Symptoms*, 290 J. Am. Med. Ass'n 1915, 1915 (2003) 14

George D. Thurston et al., *Summertime Haze Air Pollution and Children with Asthma*, 155 Am. J. Respir. & Crit. Care Med. 654 (1997) 13

Gregory Wellenius et al., *Particulate Air Pollution and Hospital Admissions for Congestive Heart Failure in Seven United States Cities*, 97 Am. J. Cardiology 404 (2006) 9

TABLE OF AUTHORITIES – Continued

Page

Gregory Wellenius et al., *Particulate Air Pollution and the Rate of Hospitalization for Congestive Heart Failure among Medicare Beneficiaries in Pittsburgh, Pennsylvania*, 161 Am. J. Epidemiology 1030 (2005) 9

Gunter Oberdorster et al., *Nanotoxicology: An Emerging Discipline Evolving from Studies of Ultrafine Particles*, 113 Envtl. Health Persp. 823 (2005) 7

Helene Desqueyroux et al., *Effects of Air Pollution on Adults with Chronic Obstructive Pulmonary Disease*, 6 Archives Envtl. Health 554 (2002) 13

Helene Desqueyroux et al., *Short-Term Effects of Low-Level Air Pollution on Respiratory Health of Adults Suffering from Moderate to Severe Asthma*, 89 Envtl. Res. 29 (2002) 13

James C. Slaughter et al., *Effects of Ambient Air Pollution on Symptom Severity and Medication Use in Children with Asthma*, 91 Ann. Allergy Asthma & Immunology 346 (2003) 10

Jane Q. Koenig et al., *Prior Exposure to Ozone Potentiates Subsequent Response to Sulfur Dioxide in Adolescent Asthmatic Subjects*, 141 Am. Rev. Respir. Disease 377 (1990) 16

Janneane F. Gent et al., *Association of Low-Level Ozone and Fine Particles with Respiratory Symptoms in Children with Asthma*, 290 J. Am. Med. Ass'n 1859 (2003) 13, 14

Jennifer K. Mann et al., *Air Pollution and Hospital Admissions for Ischemic Heart Disease in Persons with Congestive Heart Failure or Arrhythmia*, 110 Envtl. Health Persp. 1247 (2002) 17

TABLE OF AUTHORITIES – Continued

Page

John M. Peters et al., *A Study of Twelve Southern California Communities with Differing Levels and Types of Air Pollution II: Effects on Pulmonary Function*, 159 Am. J. Respir. & Crit. Care Med. 768 (1999) 13

Jonathan I. Levy et al., *Ozone Exposure and Mortality: An Empiric Bayes Metaregression Analysis*, 16 Epidemiology 458 (2005) 12

Jordi Sunyer et al., *Urban air pollution and Emergency Admissions for Asthma in Four European Cities: the APHEA Project*, 52 Thorax 760 (1997) 16

Kazuhiko Ito et al., *Associations Between Ozone and Daily Mortality: Analysis and Meta-Analysis*, 16 Epidemiology 446 (2005) 12

Kristi B. Metzger et al., *Ambient Air Pollution and Cardiovascular Emergency Department Visits in Atlanta, Georgia, 1993-2000*, 15 Epidemiology 46 (2004) 8

Leonardo Trasande & George D. Thurston, *The Role of Air Pollution in Asthma and Other Pediatric Morbidities*, 115 J. Allergy & Clinical Immunology 689 (2005) 15

Mei Lin et al., *The Influence of Ambient Coarse Particulate Matter on Asthma Hospitalization in Children: case-crossover and time-series analyses*, 110 Envtl. Health Persp. 575 (2002) 10

Michelle L. Bell et al., *A Meta-Analysis of Time-Series Studies of Ozone and Mortality with Comparison to the National Morbidity, Mortality, and Air Pollution Study*, 16 Epidemiology 436 (2005) 12

TABLE OF AUTHORITIES – Continued

Page

Michelle L. Bell et al., *Ozone and short-term mortality in 95 US urban communities, 1987-2000*, 292 J. Am. Med. Ass'n 2372 (2004) 12

Milan J. Hazucha et al., *Lung Function Response of Healthy Women after Sequential Exposures to NO_2 and O_3*, 150 Am. J. Respir. & Crit. Care Med. 642 (1994) 15

Miriam G. Cisternas et al., *A comprehensive study of direct and indirect costs of adult asthma*, 111 J. Allergy & Clinical Immunology 1212 (2003) 18

Paige E. Tolbert et al., *Air Quality and Pediatric Emergency Room Visits for Asthma in Atlanta, Georgia*, 151 Am. J. Epidemiology 798 (2000) 10

Patrick L. Kinney & Mortin Lippmann, *Respiratory Effects of Seasonal Exposures to Ozone and Particles*, 55 Archives Envtl. Health 210 (2000) 13

Peter Höppe et al., *Environmental Ozone Effects in Different Population Subgroups*, 206 Int'l J. Hygiene & Envtl. Health 505 (2003) 13

Ralph J. Delfino et al., *Emergency Room Visits for Respiratory Illnesses Among the Elderly in Montreal: Association with Low Level Ozone Exposure*, 76 Envtl. Res. 67 (1998) 13

Richard T. Burnett et al., *Association Between Ozone and Hospitalization for Respiratory Diseases in 16 Canadian Cities*, 72 Envtl. Res. 24 (1997) 13

Rob McConnell et al., *Asthma in Exercising Children Exposed to Ozone*, 359 Lancet 386 (2002) 14

TABLE OF AUTHORITIES – Continued

Page

Rodney R. Dietert et al., *Workshop to identify critical windows of exposure for children's health: immune and respiratory systems workgroup summary*, 108 Envtl. Health Persp. 183 (2000) 5

Shang-Shyue Tsai et al., *Evidence for an Association Between Air Pollution and Daily Stroke Admissions in Kaohsiung, Taiwan*, 34 Stroke 2612 (2003) 7, 8

Sharon K. Sagiv et al., *A Time Series Analysis of Air Pollution and Preterm Birth in Pennsylvania, 1997-2001*, 113 Envtl. Health Persp. 602 (2005) 10

Staff of Senate Committee on the Environment and Public Works, 95th Cong., *A Legislative History of the Clean Air Act Amendments of 1977* (Comm. Print 1978) 5, 22, 23, 24

Stephen Van Den Eeden et al., Final Report to the California Air Resources Board, Contract 97-303, *Particulate Air Pollution and Morbidity in the California Central Valley: a high particulate pollution region* (2002) 9

Steven N. Goodman, *The Methodologic Ozone Effect*, 16 Epidemiology 430 (2005) 12

U.S. Environmental Protection Agency, *Air Trends: International Issues & U.S. Air Quality, at* http://www.epa.gov/airtrends/international.html 21

U.S. Environmental Protection Agency, *Clean Air Markets – Data & Maps: Where You Live, at* http://cfpub.epa.gov/gdm/index.cfm?fuseaction=whereyoulive.nation 19

TABLE OF AUTHORITIES – Continued

Page

U.S. Environmental Protection Agency, *Clean Air Markets – Data & Maps: Facility EmissionsReport*, *at* http://cfpub.epa.gov/gdm/index.cfm?fuseaction=emissions.wizard 19

U.S. Environmental Protection Agency, EPA/600/P-99/002aF, *Air Quality Criteria for Particulate Matter* (2004), *available at* http://oaspub.epa.gov/eims/eimscomm.getfile?p_download_id=435945... 6, 7, 10

U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, EPA/454/R-3-005, *2003 Special Trends Report* (2003).....11, 14, 16

U.S. Environmental Protection Agency, Office of Air and Radiation, EPA-452/F-03-001, *Particulate Pollution and Your Health* (2003), *available at* http://www.epa.gov/airnow/ particle/pm-color.pdf..... 6

U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, EPA/456/F-98-005, *NO_x: how nitrogen oxides affect the way we live and breathe* (1998), *available at* http://www.epa.gov/oar/noxfldr.pdf 11

U.S. Environmental Protection Agency, Office of Air and Radiation, Office of Air Quality Planning and Standards, factsheet, *Health and Environmental Effects of Ground-Level Ozone* (1997), *at* http://www.epa.gov/ttn/oarpg/naaqsfin/o3health.html..... 11

U.S. Environmental Protection Agency, Office of Air and Radiation, EPA-452/R-97-002, *Nitrogen Oxides: Impacts on Public Health and the Environment* (1997)..... 11

TABLE OF AUTHORITIES – Continued

Page

U.S. Environmental Protection Agency, Research Triangle Park, EPA-452/R-95-005, *Review of the National Ambient Air Quality Standards for Nitrogen Oxides: Assessment of Scientific and Technical Information* (1995) 15

Willem R. M. Dassen et al., *Decline in Children's Pulmonary Function During an Air Pollution Episode*, 36 J. Air Pollution Control Ass'n 1223 (1986) 17

W. James Gauderman et al., *Association between Air Pollution and Lung Function Growth in Southern California Children: results from a second cohort*, 166 Am. J. Respir. & Crit. Care Med. 76 (2002) 10, 15

W. James Gauderman et al., *The effect of air pollution on lung development from 10 to 18 years of age*, 351 New Engl. J. Med. 1057 (2004) 10

William S. Linn et al., *Air Pollution and Daily Hospital Admissions in Metropolitan Los Angeles*, 108 Envtl. Health Persp. 427 (2000) 17

World Watch Institute, World Watch Paper #94, *Cleaning the Air: A Global Agenda* (1994) 17

Yun-Chul Hong et al., *Effects of Air Pollutants on Acute Stroke Mortality*, 110 Envtl. Health Persp. 187 (2002) 7

INTEREST OF AMICI[1]

The American Lung Association ("ALA"), a nonprofit organization founded in 1904, is one of the nation's oldest voluntary health organizations. ALA's mission is to prevent lung disease and promote lung health. ALA is active in research, public education, and advocacy to reduce air pollution and its accompanying threats to lung health. ALA has published many reports on air pollution, most notably the annual *American Lung Association State of the Air* report. Through its advocacy programs, ALA has participated in the development and enforcement of laws and regulations related to lung health at the national, state, and local levels, including playing a major role in the passage of the Clean Air Act ("CAA") Amendments of 1977 and 1990.

The American Thoracic Society ("ATS"), an international educational and scientific organization, was founded in 1905. ATS, and the approximately 13,000 physicians and scientists it represents, help prevent and fight respiratory disease around the globe through research, education, patient care, and advocacy. ATS publishes a number of scientific journals that include studies on air pollution and health. In fact, the United States Environmental Protection Agency ("EPA") has consulted ATS guidelines to characterize the adverse effects of exposure to air pollution. *See, e.g., National Ambient Air Quality Standards for*

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief either in whole or in part. No persons other than the amici made any monetary contributions to its preparation or submission. Petitioners, Respondent, and the Solicitor General of the United States consented to this filing, and letters of consent are being submitted with the brief.

Ozone, 62 Fed. Reg. 38,856, 38,860 (July 18, 1997) (codified at 40 C.F.R. §§ 50.9, 50.10).

The American Association for Cardiovascular and Pulmonary Rehabilitation ("AACVPR"), founded in 1985, is a national organization representing approximately 3,000 members expert in assessing the harm to human health caused by air pollution. AACVPR and its physician and scientist members are dedicated to reducing morbidity, mortality, and disability from cardiovascular and pulmonary diseases. AACVPR carries out its goal through education, prevention, rehabilitation, research, and aggressive disease management programs, including publication of the *Journal of Cardiopulmonary Rehabilitation*, a scientific journal that includes studies on the health effects of air pollution.

The National Association for the Medical Direction of Respiratory Care ("NAMDRC") was founded in 1977 and represents approximately 600 members working at more than 2,000 hospitals nationwide. NAMDRC and its members are devoted to studying, preventing, and treating thoracic and respiratory diseases in order to carry out their mission of reducing the morbidity and mortality of patients with respiratory disorders. NAMDRC advances that mission through various prevention, education, and advocacy programs to protect lung health, such as filing comments with EPA regarding the public health impacts of proposed air pollutant regulations. *See, e.g.*, *National Ambient Air Quality Standards for Particulate Matter*, 71 Fed. Reg. 2,620 (proposed Jan. 17, 2006) (to be codified at 40 C.F.R. § 50).

The American College of Chest Physicians ("ACCP"), founded in 1935, is an international medical society

dedicated to providing postgraduate medical education for physicians, surgeons, and allied health professionals involved in the diagnosis and treatment of chest diseases. ACCP, and the more than 16,000 health care professionals it represents, help promote the prevention and treatment of diseases of the chest through leadership, education, research, and communication. ACCP publishes *CHEST*, a leading scientific journal featuring clinical research in pulmonary, critical care, sleep, and chest medicine disciplines. ACCP also advocates before government agencies and the courts, offering expert opinion on issues affecting cardiopulmonary health, including the effects of air pollution. *See, e.g., New York v. U.S. Environmental Protection Agency*, 413 F.3d 3, 30 (D.C. Cir. 2005) (discussing studies on the health effects of air emissions that were presented by amici, including ACCP).

Amici support Petitioners' position because of the significant negative health effects associated with increased emissions from coal-fired power plants.

SUMMARY OF ARGUMENT

Air pollution can have severe, even fatal, health effects. Coal-fired power plants, like those operated by Duke Energy Corporation ("Duke"), emit dangerous air pollutants, notably particulate matter, nitrogen oxides, and sulfur dioxide. Exposure to these pollutants can cause a myriad of health impacts, including premature death, increased hospitalization for asthma, and development of chronic respiratory diseases. Air pollution is especially harmful to children and their developing respiratory systems. Air pollution from power plants is also responsible for significant social welfare

costs, such as increased health care costs, job absences, and missed school days.

Congress added the Prevention of Significant Deterioration ("PSD") program to the Clean Air Act ("CAA") in 1977 specifically to protect public health and welfare from the injurious effects of air pollution by tightening existing pollution controls. Under the PSD program, the operator of an emitting facility in an area that has attained national ambient air quality standards ("NAAQS") may not undertake a "modification" of that facility unless EPA has issued a permit. To fulfill Congress's goal of protecting public health and welfare, EPA has required operators of coal-fired power plants to obtain a PSD permit for any plant modifications that will cause a significant increase in annual net emissions.

However, the Fourth Circuit Court of Appeals rejected EPA's interpretation of what constitutes a PSD "modification" and instead imposed a definition that will allow old coal-fired power plants to be completely refurbished and increase their total amount of harmful emissions, without being required to obtain a permit from EPA. Such plant refurbishments substantially increase the actual amount of air pollution emitted to the surrounding community, thereby further degrading air quality and causing significant adverse public health and welfare effects. Contrary to the Fourth Circuit's ruling, EPA correctly implemented a PSD program that achieves Congress's goal of protecting public health and welfare from the harms of increased air pollution from power plant "modifications."

ARGUMENT

I. Air Pollution from Coal-Fired Power Plants Has Significant and Severe Impacts on Public Health and Welfare.

Coal-fired power plants, which are comprised of individual electric generating units ("EGUs"), are major sources of three pollutants specifically addressed in the Clean Air Act: particulate matter ("PM"), nitrogen oxides ("NO_x"), and sulfur dioxide ("SO_2"). *See* 42 U.S.C. § 7403(g)(1) (2004). Not only are these pollutants harmful themselves, but NO_x and SO_2 also contribute to the formation of additional PM, and NO_x is an essential precursor to the creation of ozone. The emission of these pollutants, as well as their roles in forming additional pollutants after emission, has significant and severe impacts on public health, even when the pollutants are present at levels below the air quality standards mandated by the CAA. *See* Staff of Senate Committee on the Environment and Public Works, 95th Cong., *A Legislative History of the Clean Air Act Amendments of 1977*, 6634-55 (Comm. Print 1978) [hereinafter "*CAA 1977 Legis. History*"] (statement of the House Committee on Interstate and Foreign Commerce) (discussing multiple ways in which attainment of NAAQS does not adequately protect public health).

Children are especially vulnerable to the health impacts of air pollution because they breathe more air per pound of body weight than adults and because most of the human respiratory capacity is developed before the age of eighteen.[2] Moreover, because children are outside for

[2] Rodney R. Dietert et al., *Workshop to identify critical windows of exposure for children's health: immune and respiratory systems work-group summary*, 108 Envtl. Health Persp. 483 (2000); Blanka Binková

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longer periods of time and are usually more active when outdoors, they inhale more polluted air than adults typically do.[3]

A. Health Impacts of Particulate Matter

According to EPA, PM is a "mixture of microscopic solids and liquid droplets suspended in the air" made up of a number of different components, including acids, chemicals, metals, soils, dust, and allergens, such as pollen. U.S. Environmental Protection Agency, Office of Air and Radiation, EPA-452/F-03-001, *Particulate Pollution and Your Health* (2003), *available at* http://www.epa.gov/airnow/particle/pm-color.pdf. The particles that make up PM vary in size, but most are one-seventh to one-thirtieth the diameter of a strand of human hair. Researchers categorize PM according to size – generally speaking, coarse particles are between 2.5 and 10 microns in diameter ($PM_{10-2.5}$); fine particles are 2.5 microns in diameter or smaller ($PM_{2.5}$); and ultrafine particles are smaller than 0.1 micron in diameter.[4] Because of the relatively small size of individual particles, PM is often visible only as the haze that forms when millions of particles in the air blur the spread of sunlight.

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et al., *The effects of air pollution on children's health and development: a review of the evidence*, WHO Regional Office for Europe (2004), *available at* http://www.euro.who.int/document/EEHC/execsum.pdf.

[3] American Academy of Pediatrics, Committee on Environmental Health, *Ambient Air Pollution: Health Hazards to Children*, 114 Pediatrics 1699 (2004).

[4] U.S. Environmental Protection Agency, EPA/600/P-99/002aF, *Air Quality Criteria for Particulate Matter*, Vol. 1, p. 2-7 to 2-37 (2004), *available at* http://oaspub.epa.gov/eims/eimscomm.getfile?p_download_id=435945.

Coal-fired power plants produce PM through both mechanical and chemical processes. Burning coal mechanically produces coarse PM and larger, visible particles by breaking or reducing large chunks of coal into smaller ash and soot, with the material itself remaining the same chemically.[5] Burning coal also emits elemental carbon, SO_2, and NO_x, which chemically react with water and other compounds in the atmosphere to form fine and ultrafine particles of different chemical compounds.[6]

Because of PM's size, these particles get trapped in the smaller airways and alveoli of the lungs, and the fine and ultrafine PM can pass through the alveoli into the blood stream, traveling throughout the body.[7] Although PM may vary in size and method of formation, the interaction of all sizes of PM with the body can have serious consequences.

Exposure to PM can kill.[8] When PM levels in the air are high, deaths can occur immediately (i.e., on that day or soon thereafter), or within one to two months, by inducing heart attacks and strokes.[9] In addition, daily exposure to

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[5] *Id.*

[6] *Id.*

[7] Gunter Oberdorster et al., *Nanotoxicology: An Emerging Discipline Evolving from Studies of Ultrafine Particles*, 113 Envtl. Health Persp. 823 (2005).

[8] C. Arden Pope III et al., *Particulate Air Pollution and Daily Mortality on Utah's Wasatch Front*, 107 Envtl. Health Persp. 567 (1999).

[9] Francesca Dominici et al., *On the Use of Generalized Additive Models in Time-Series Studies of Air Pollution and Health*, 156 Am. J. Epidemiology 193 (2002); Yun-Chul Hong et al., *Effects of Air Pollutants on Acute Stroke Mortality*, 110 Envtl. Health Persp. 187 (2002); Shang-Shyue Tsai et al., *Evidence for an Association Between Air Pollution*

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PM, even at low levels, can lead to death by causing life-threatening diseases.[10] Unfortunately, PM does not just make people die a few days earlier than they might otherwise; these are premature deaths that would not have occurred until months or years later if the air were cleaner.[11]

In addition to premature death, sharp increases in PM levels in air pollution have been linked to other serious health effects, including increased numbers of heart attacks (especially among the elderly and people with cardiovascular disease),[12] increased hospitalization for cardiovascular disease (including strokes and congestive heart failure),[13] increased emergency room visits for

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and Daily Stroke Admissions in Kaohsiung, Taiwan, 34 Stroke 2612 (2003).

[10] Douglas W. Dockery et al., *An Association Between Air Pollution and Mortality in Six U.S. Cities*, 329 New Engl. J. Med. 1753 (1993); C. Arden Pope III et al., *Particulate Air Pollution as a Predictor of Mortality in a Prospective Study of U.S. Adults*, 151 Am. J. Respir. & Crit. Care Med. 669 (1995); Daniel Krewski et al., *Reanalysis of the Harvard Six Cities Study and the American Cancer Society Study of Particulate Air Pollution and Mortality* (Health Effects Institute 2000).

[11] Antonella Zanobetti et al., *The Temporal Pattern of Respiratory and Heart Disease Mortality in Response to Air Pollution*, 111 Envtl. Health Persp. 1188 (2003); Francesca Dominici et al., *Airborne Particulate Matter and Mortality: timescale effects in four US cities*, 157 Am. J. Epidemiology 1055 (2003).

[12] Daniela D'Ippoliti et al., *Air Pollution and Myocardial Infarction in Rome: a case-crossover analysis*, 14 Epidemiology 528 (2003); Antonella Zanobetti & Joel Schwartz, *The Effect of Particulate Air Pollution on Emergency Admissions for Myocardial Infarction: A Multicity Case-Crossover Analysis*, 113 Envtl. Health Persp. 978 (2005).

[13] Kristi B. Metzger et al., *Ambient Air Pollution and Cardiovascular Emergency Department Visits in Atlanta, Georgia, 1993-2000*, 15 Epidemiology 46 (2004); Shang-Shyue Tsai et al., *Evidence for an Association Between Air Pollution and Daily Stroke Admissions*, *supra*

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patients suffering from acute respiratory ailments,[14] and inflammation of lung tissue in otherwise healthy young adults.[15] In addition, scientific evidence shows that chronic exposure to PM can shorten life one to three years by increasing the risk of dying from lung cancer and cardiovascular diseases,[16] as well as by inflicting significant damage to the small airways of the lungs.[17]

Those at the greatest risk of adverse health effects from chronic exposure to PM pollution include children (18 years and younger), the elderly (65 years and older), people with chronic lung diseases (such as asthma, chronic bronchitis, and emphysema), people with chronic cardiovascular

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note 10; Gregory Wellenius et al., *Particulate Air Pollution and Hospital Admissions for Congestive Heart Failure in Seven United States Cities*, 97 Am. J. Cardiology 404 (2006); Gregory Wellenius et al., *Particulate Air Pollution and the Rate of Hospitalization for Congestive Heart Failure among Medicare Beneficiaries in Pittsburgh, Pennsylvania*, 161 Am. J. Epidemiology 1030 (2005).

[14] Stephen Van Den Eeden et al., Final Report to the California Air Resources Board, Contract 97-303, *Particulate Air Pollution and Morbidity in the California Central Valley: a high particulate pollution region* (2002).

[15] Andrew J. Ghio et al., *Concentrated Ambient Air Particles Induce Mild Pulmonary Inflammation in Healthy Human Volunteers*, 162 Am. J. Respir. & Crit. Care Med. 981 (2000).

[16] C. Arden Pope III, *Epidemiology of Fine Particulate Air Pollution and Human Health: biological mechanisms and who's at risk?*, 108 Envtl. Health Persp. 713 (2000); C. Arden Pope III et al., *Lung Cancer, Cardiopulmonary Mortality, and Long-Term Exposure to Fine Particulate Air Pollution*, 287 J. Am. Med. Ass'n 9 (2002); C. Arden Pope III et al., *Cardiovascular Mortality and Year-round Exposure to Particulate Air Pollution: epidemiological evidence of general pathophysiological pathways of disease*, 109 Circulation 71 (2004).

[17] Andrew Churg et al., *Chronic Exposure to High Levels of Particulate Air Pollution and Small Airway Remodeling*, 111 Envtl. Health Persp. 714 (2003).

disease, and people with diabetes.[18] Children are among the most vulnerable to continual exposure to PM, beginning even before they are born and shaping the future of their bodies' ability to function. Chronic exposure to PM has been linked to increased risk of premature birth and slowed lung function growth in children and teenagers.[19] Short-term increases in PM levels are especially harmful to children, causing increased severity of asthma attacks and increased hospitalization for asthma.[20]

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[18] U.S. Environmental Protection Agency, *Air Quality Criteria for Particulate Matter*, *supra* note 4; Antonella Zanobetti & Joel Schwartz, *Are Diabetics More Susceptible to the Health Effects of Airborne Particles?*, 164 Am. J. Respir. & Crit. Care Med. 831 (2001).

[19] Sharon K. Sagiv et al., *A Time Series Analysis of Air Pollution and Preterm Birth in Pennsylvania, 1997-2001*, 113 Envtl. Health Persp. 602 (2005); W. James Gauderman et al., *Association between Air Pollution and Lung Function Growth in Southern California Children: results from a second cohort*, 166 Am. J. Respir. & Crit. Care Med. 76 (2002); W. James Gauderman et al., *The effect of air pollution on lung development from 10 to 18 years of age*, 351 New Engl. J. Med. 1057 (2004).

[20] James C. Slaughter et al., *Effects of Ambient Air Pollution on Symptom Severity and Medication Use in Children with Asthma*, 91 Ann. Allergy Asthma & Immunology 346 (2003); Mei Lin et al., *The Influence of Ambient Coarse Particulate Matter on Asthma Hospitalization in Children: case-crossover and time-series analyses*, 110 Envtl. Health Persp. 575 (2002); Gary Norris et al., *An Association Between Fine Particles and Asthma Emergency Department Visits for Children in Seattle*, 107 Envtl. Health Persp. 489 (1999); Paige E. Tolbert et al., *Air Quality and Pediatric Emergency Room Visits for Asthma in Atlanta, Georgia*, 151 Am. J. Epidemiology 798 (2000).

B. Health Impacts of Nitrogen Oxides

In addition to PM, coal-burning power plants produce nitrogen oxides, or NO_x, a term referring to variant combinations of nitrogen and oxygen atoms in the atmosphere.[21] High-temperature combustion processes, such as those occurring in coal-fired EGUs, motor vehicles, and heavy equipment, are the primary outdoor sources of NO_x emissions.[22] Power plant NO_x emissions' most significant impact occurs from their role as a precursor to PM and ozone, but NO_x emissions also directly harm human health.[23]

1. Ozone

Ozone is a dangerous pollutant that forms when NO_x in the air combines with volatile organic compounds in the presence of heat and sunlight.[24] Recent studies have shown that acute exposure to ground level ozone can kill. Two studies published in 2004, one looking at ninety-five cities

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[21] U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, EPA/456/F-98-005, *NO_x: how nitrogen oxides affect the way we live and breathe* (1998), *available at* http://www.epa.gov/oar/noxfldr.pdf.

[22] U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, EPA/454/R-3-005, *2003 Special Trends Report* (2003) at 17.

[23] U.S. Environmental Protection Agency, Office of Air and Radiation, EPA-452/R-97-002, *Nitrogen Oxides: Impacts on Public Health and the Environment* (1997); U.S. Environmental Protection Agency, *NO_x: how nitrogen oxides affect the way we live and breathe*, *supra* note 21.

[24] U.S. Environmental Protection Agency, Office of Air and Radiation, Office of Air Quality Planning and Standards, factsheet, *Health and Environmental Effects of Ground-Level Ozone* (1997), *at* http://www.epa.gov/ttn/oarpg/naaqsfin/o3health.html (last viewed on July 13, 2006).

across the United States and the other examining twenty-three European cities, found that even on days when ozone levels were below the current national standards, an increase in ozone significantly increased the risk of premature death.[25] Three subsequent studies reviewed other data and confirmed that short-term exposure to high levels of ozone can shorten life.[26]

Premature deaths from exposure to ozone occur because "[o]zone is capable of causing inflammation in the lung at lower concentrations than any other gas, . . . [which] would be a hazard to anyone with heart failure and pulmonary congestion, and would worsen the function of anyone with advanced lung disease." David V. Bates, *Ambient Ozone and Mortality*, 16 Epidemiology 427, 428 (2005). In addition, research indicates that chronic ozone exposure may lead to decreased lung function in the general population.[27]

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[25] *See* Michelle L. Bell et al., *Ozone and short-term mortality in 95 US urban communities, 1987-2000*, 292 J. Am. Med. Ass'n 2372 (2004); Alexandros Gryparis et al., *Acute Effects of Ozone on Mortality from the "Air Pollution and Health: A European Approach" Project*, 170 Am. J. Respir. & Crit. Care Med. 1080 (2004).

[26] Michelle L. Bell et al., *A Meta-Analysis of Time-Series Studies of Ozone and Mortality with Comparison to the National Morbidity, Mortality, and Air Pollution Study*, 16 Epidemiology 436 (2005); Jonathan I. Levy et al., *Ozone Exposure and Mortality: An Empiric Bayes Metaregression Analysis*, 16 Epidemiology 458 (2005); Kazuhiko Ito et al., *Associations Between Ozone and Daily Mortality: Analysis and Meta-Analysis*, 16 Epidemiology 446 (2005); Steven N. Goodman, *The Methodologic Ozone Effect*, 16 Epidemiology 430 (2005).

[27] Committee of the Environmental & Occupational Health Assembly of the American Thoracic Society, *Health effects of outdoor air pollution*, 153 Am. J. Respir. & Crit. Care Med. 3, 26-27 (1996); Audrey Galizia & Patrick L. Kinney, *Long-term Residence in Areas of High Ozone*, 107 Envtl. Health Persp. 675 (1999).

Scientists have long recognized the harmful health effects of ozone exposure, including shortness of breath, chest pain when inhaling deeply, wheezing and coughing, increased susceptibility to respiratory infections, and increased risk of asthma attacks.[28] Children, senior citizens, people who work or exercise outdoors, people with lung diseases (such as asthma, chronic bronchitis, and emphysema), and otherwise healthy people who have an enhanced ozone reactions are especially vulnerable to the effects of breathing ozone.[29]

For people with asthma, ozone exposure is especially harmful, increasing the need for medical treatment and for hospitalization.[30] Health experts warn that air pollution,

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[28] ATS Comm., *Health Effects of Outdoor Air Pollution*, *supra* note 27.

[29] Helene Desqueyroux et al., *Effects of Air Pollution on Adults with Chronic Obstructive Pulmonary Disease*, 6 Archives Envtl. Health 554 (2002); Peter Höppe et al., *Environmental Ozone Effects in Different Population Subgroups*, 206 Int'l J. Hygiene & Envtl. Health 505 (2003); Ralph J. Delfino et al., *Emergency Room Visits for Respiratory Illnesses Among the Elderly in Montreal: Association with Low Level Ozone Exposure*, 76 Envtl. Res. 67 (1998); John M. Peters et al., *A Study of Twelve Southern California Communities with Differing Levels and Types of Air Pollution II: Effects on Pulmonary Function*, 159 Am. J. Respir. & Crit. Care Med. 768 (1999); George D. Thurston et al., *Summertime Haze Air Pollution and Children with Asthma*, 155 Am. J. Respir. & Crit. Care Med. 654 (1997); Patrick L. Kinney & Mortin Lippmann, *Respiratory Effects of Seasonal Exposures to Ozone and Particles*, 55 Archives Envtl. Health 210 (2000).

[30] Janneane F. Gent et al., *Association of Low-Level Ozone and Fine Particles with Respiratory Symptoms in Children with Asthma*, 290 J. Am. Med. Ass'n 1859 (2003); Helene Desqueyroux et al., *Short-Term Effects of Low-Level Air Pollution on Respiratory Health of Adults Suffering from Moderate to Severe Asthma*, 89 Envtl. Res. 29 (2002); Richard T. Burnett et al., *Association Between Ozone and Hospitalization for Respiratory Diseases in 16 Canadian Cities*, 72 Envtl. Res. 24 (1997).

including ozone, is "one of the most under-appreciated contributors to asthma exacerbation." George D. Thurston & David V. Bates, *Air Pollution as an Underappreciated Cause of Asthma Symptoms*, 290 J. Am. Med. Ass'n 1915, 1915 (2003). Even at levels currently considered safe, children with asthma are among those most vulnerable to ozone pollution.[31] A recent study suggests that year-round exposure to ozone may be associated with an increased risk of the development of asthma in children.[32] While more research is needed to confirm this finding, researchers tracked 3,500 students in Southern California and found an increased onset of asthma in children who took part in three or more outdoor activities in communities with high levels of ozone.[33]

2. Nitrogen Dioxide

In addition to forming ozone and PM, NO_x emissions from coal-fired power plants can also directly harm human health. Most NO_x enters the atmosphere as nitrogen oxide (NO) and then readily convert to nitrogen dioxide (NO_2), a reddish-brown gas that can become an important component of urban haze.[34]

EPA has determined that short-term exposure to NO_2 can lead to increases in respiratory diseases in children

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[31] Janneane F. Gent et al., *Association of Low-Level Ozone and Fine Particles with Respiratory Symptoms in Children with Asthma*, *supra* note 30.

[32] *See* Rob McConnell et al., *Asthma in Exercising Children Exposed to Ozone*, 359 Lancet 386 (2002).

[33] *Id.*

[34] U.S. Environmental Protection Agency, *2003 Special Trends Report*, *supra* note 22.

five to twelve years old, as well as coughing and increased changes in airway responsiveness and pulmonary function in adults with chronic lung diseases.[35] Long-term exposure to NO_2 may lead to increased susceptibility to respiratory infection and may cause emphysema-like lesions in the lungs.[36] Research has also shown that healthy adult women who are exposed to NO_2 experience an increase in the severity of their subsequent response to ozone.[37]

Exposure to NO_2 emissions is particularly harmful to children, weakening their defenses against respiratory infection and reducing lung function.[38] In fact, research suggests that children exposed to high levels of NO_2 may become more susceptible to critical infections of the respiratory tract.[39]

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[35] U.S. Environmental Protection Agency, Research Triangle Park, EPA-452/R-95-005, *Review of the National Ambient Air Quality Standards for Nitrogen Oxides: Assessment of Scientific and Technical Information* (1995); *National Ambient Air Quality Standards for Nitrogen Dioxide: Final Decision*, 61 Fed. Reg. 52,852 (October 8, 1996) (codified at 40 C.F.R. § 50).

[36] U.S. Environmental Protection Agency, *Review of the National Ambient Air Quality Standards for Nitrogen, Oxides, supra* note 35.

[37] Milan J. Hazucha et al., *Lung Function Response of Healthy Women after Sequential Exposures to NO_2 and O_3*, 150 Am. J. Respir. & Crit. Care Med. 642 (1994).

[38] W. James Gauderman et al., *Association Between Air Pollution and Lung Function Growth in Southern California Children, supra* note 18.

[39] Leonardo Trasande & George D. Thurston, *The Role of Air Pollution in Asthma and Other Pediatric Morbidities*, 115 J. Allergy & Clinical Immunology 689 (2005).

C. Health Impacts of Sulfur Dioxide

Sulfur dioxide (SO_2), a gaseous compound formed largely by burning coal and oil containing sulfur, is another pollutant emitted from coal-fired power plants that has significant adverse health effects.[40] For most healthy people, SO_2 appears to be a temporary irritant, generally causing comparatively minor discomfort. However, if an individual resides near a source of continuous SO_2 emissions, such as a coal-fired power plant, the irritant can become a persistent aggravation.[41] For people with asthma, short-term exposures to high levels of SO_2 has been linked to rapidly worsened asthma, increasing the need for hospitalization.[42]

Since SO_2 is often present with other pollutants in the air, especially PM and ozone, exposure to SO_2 provides a good example of how a combination of air pollutants may increase the overall adverse health effects of air pollution. In one study, researchers exposed teenagers with asthma to ozone alone, SO_2 alone, and then ozone followed by SO_2, and found that the last combination triggered bronchial reactions.[43] In addition, research suggests that increased

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[40] U.S. Environmental Protection Agency, *2003 Special Trends Report, supra* note 22, at 43.

[41] American Lung Association, *Health Effects of Outdoor Air Pollution* (1996) at 18.

[42] Donald Horstman and Lawrence J. Folinsbee, *Sulfur dioxide-Induced Bronchoconstriction in Asthmatics Exposed for Short Durations under Controlled Conditions: A Selected Review, in Susceptibility to Inhaled Pollutants* (M. Utell & R. Frank eds., 1989); Jordi Sunyer et al., *Urban air pollution and Emergency Admissions for Asthma in Four European Cities: the APHEA Project*, 52 Thorax 760 (1997).

[43] *See* Jane Q. Koenig et al., *Prior Exposure to Ozone Potentiates Subsequent Response to Sulfur Dioxide in Adolescent Asthmatic Subjects*, 141 Am. Rev. Respir. Disease 377 (1990).

levels of SO_2 pollution in the air, in conjunction with PM, may trigger a small but measurable loss of lung function in children.[44]

D. Social Welfare Impacts of Emissions from Coal-Fired Electric Generating Units

In addition to direct adverse health effects, air pollution caused by emissions from coal-fired power plants produces serious social welfare impacts. The costs associated with the myriad of health effects of air pollution are staggering. For example, air pollution from coal-fired power plants in the Midwest has been associated with $25 billion per year in health costs.[45] Air pollution also inflates social welfare costs through increased hospital admissions. Increases in coarse PM (PM_{10}) and nitrogen dioxide (NO_2) pollution are associated with increased hospital admissions for cardiovascular disease.[46] Patients diagnosed with arrhythmia or congestive heart failure are particularly likely to be admitted to the hospital during periods of high air pollution.[47] In addition to hospital admissions, increased air pollution can also result in increased costs

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[44] Douglas W. Dockery et al., *Change in Pulmonary Function in Children Associated with Air Pollution Episodes*, 32 J. Air Pollution Control Ass'n 937 (1986); Willem R. M. Dassen et al., *Decline in Children's Pulmonary Function During an Air Pollution Episode*, 36 J. Air Pollution Control Ass'n 1223 (1986).

[45] World Watch Institute, World Watch Paper #94, *Cleaning the Air: A Global Agenda* (1994) at 12.

[46] William S. Linn et al., *Air Pollution and Daily Hospital Admissions in Metropolitan Los Angeles*, 108 Envtl. Health Persp. 427 (2000).

[47] Jennifer K. Mann et al., *Air Pollution and Hospital Admissions for Ischemic Heart Disease in Persons with Congestive Heart Failure or Arrhythmia*, 110 Envtl. Health Persp. 1247 (2002).

associated with standard doctors' office visits, treatment of respiratory illnesses, and lost work days.[48]

Because of the particular vulnerability of children to air pollution, another serious social and economic impact resulting from air pollution is lost school days. A recent study found that increases in ozone led to an increase in illness-related, particularly respiratory-based, absences from school.[49] Such school absences are costly to students, educators, and parents. Students who miss school are likely to suffer academically and to frustrate educators' efforts to teach them. Parents of children who are too sick to go to school often face a dilemma between missing work in order to care for their children, leaving their sick children home alone, or locating childcare, a resource that is extremely scarce and costly.

E. Public Health and Social Welfare Impacts of Air Pollution in the Carolinas

Of particular importance in this case, air pollution from coal-fired power plants harms the health and social welfare of people living in North Carolina and South Carolina (collectively, "the Carolinas"). EPA data for the

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[48] *See, e.g.*, Miriam G. Cisternas et al., *A comprehensive study of direct and indirect costs of adult asthma*, 111 J. Allergy & Clinical Immunology 1212 (2003) (estimating that adult asthma patients spend an average of $5,000 annually on asthma related expenses); California Environmental Protection Agency, Air Resources Board, *Recent Research Findings* (2004) at 4, *available at* http://www.arb.ca.gov/research/health/fs/pm-03fs.pdf (estimating that air pollution in California results in about 2.8 million lost work days per year).

[49] *See* Frank D. Gilliland et al., *The Effects of Ambient Air Pollution on School Absenteeism Due to Respiratory Illness*, 12 Epidemiology 43 (2001).

2005 operating year show that coal-fired power plants in North Carolina emitted 500,935 tons of SO_2 and 114,299 tons of NO_x.[50] In South Carolina, coal-fired power plants emitted 217,385 tons of SO_2 and 53,403 tons of NO_x in 2005.[51]

Contributing to the air pollution in the Carolinas are the eight coal-fired power plants operated by Duke that are at issue in this case (seven are located in North Carolina, and one is located in South Carolina). Data collected by EPA show that the Duke plants emitted 310,000 tons of SO_2 and 59,187 tons of NO_x in 2005 – more than one-third of the total emissions of these pollutants in the Carolinas.[52] Emissions of $SO_2$and NO_x from coal-fired power plants in

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[50] U.S. Environmental Protection Agency, *Clean Air Markets – Data & Maps: Where You Live, at* http://cfpub.epa.gov/gdm/index.cfm?fuseaction=whereyoulive.nation (follow "North Carolina" link) (last viewed on July 13, 2006).

[51] *Id.* (follow "South Carolina" link) (last viewed on July 13, 2006).

[52] U.S. Environmental Protection Agency, *Clean Air Markets – Data & Maps: Facility Emissions Report, at* http://cfpub.epa.gov/gdm/index.cfm?fuseaction=emissions.wizard (follow "Monitoring Location Level Emissions" link) (last viewed on July 13, 2006). The EPA website generated the following report for the eight Duke facilities at issue:

State	Facility Name	Facility ID	Year	SO_x Tons	NO_x Tons
NC	Belews Creek	8042	2005	96,812.7	20,419.3
NC	Buck	2720	2005	9,581.8	2,260.2
NC	Cliffside	2721	2005	28,209.1	3,986.7
NC	Dan River	2723	2005	4,248.3	1,611.2
NC	G G Allen	2718	2005	45,424.3	8,324.5
NC	Marshall	2727	2005	100,540.4	17,534.5
NC	Riverbend	2731	2005	13,964.0	2,619.7
SC	W S Lee	3264	2005	11,219.7	2,431.1
			TOTAL	**310,000.3**	**59,187.2**

the Carolinas not only harm human health directly, but they also contribute to the further formation of dangerous PM and ozone.

Using EPA emissions data and relevant scientific research, researchers from Abt Associates were able to assess the direct health impacts of air pollution from power plants in individual states.[53] *See* Abt Associates, Inc., *The Particulate-Related Health Benefits of Reducing Power Plant Emissions* (October 2000) [hereinafter "Abt Study"], *available at* http://www.abtassociates.com/reports/particulate-related.pdf. That study found that air pollution from coal-fired power plants had a negative impact on public health and social welfare throughout the nation. *See generally id.* at 1-1 to 1-2, and 6-10. With regard to the Carolinas, the Abt Study estimated that air pollution from coal-fired power plants in South Carolina annually contributes to approximately 800 deaths, 500 hospitalizations, 500 new cases of chronic bronchitis, and 16,600 asthma attacks, about 200 of which lead to emergency room ("ER") visits. *Id.* at 6-10. In North Carolina, the estimated yearly health effects of air pollution from coal-fired power plants are even more astounding, contributing to roughly 1,800 deaths, 1,200 hospital admissions, 1,100 cases of chronic bronchitis, and 37,000 asthmas attacks, nearly 450 of which lead to ER visits. *Id.*

In addition to direct health effects, people living in the Carolinas experience serious social and economic impacts from air pollution. For example, the Abt Study estimated

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[53] Abt Associates is a scientific research and policy analysis consulting firm that EPA has employed to conduct research regarding air pollution. Abt Study at i.

that, each year, air pollution from power plants results in about 322,000 lost work days in North Carolina and 141,000 lost work days in South Carolina. *Id.* Air pollution can also lead to days in which people do not feel able to participate fully in their normal activities and must restrict their behavior. *See* Abt Study at 5-25 (discussing "minor restricted activity days" or MRADs). The Abt Study estimated that each year, air pollution from power plants leads to 721,000 restricted activity days in South Carolina and 1,640,000 restricted activity days in North Carolina. *Id.* at 6-10.

Any increase in air pollution from the Duke power plants can only make these statistics worse in the Carolinas, especially for the people living, working, learning, and playing in communities near the plants. Moreover, air pollution from these plants will also harm the public health and welfare of communities that are downwind from the emissions.[54]

II. The Fourth Circuit's Interpretation of a PSD "Modification" Is Inconsistent with Congressional Intent and Would Adversely Affect Public Health and Welfare.

Finding that air pollution had resulted in "mounting dangers to the public health and welfare," Congress enacted the CAA "to protect and enhance the quality of the

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[54] *See* Abt Study at E-2 (discussing calculation of impacts due to downwind air pollution); U.S. Environmental Protection Agency, *Air Trends: International Issues & U.S. Air Quality*, *at* http://www.epa.gov/airtrends/international.html (last viewed July 19, 2006) (noting that downwind flow of air pollution in the U.S., Canada, and Mexico is "well known and documented").

Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. §§ 7401(a)(2), (b)(1) (2004). However, these congressional goals are undermined by the Fourth Circuit's holding that EPA must use the same regulatory test to determine whether facility "modifications" are subject to the PSD, 42 U.S.C. § 7470 (2004), and New Source Performance Standards ("NSPS"), 42 U.S.C. § 7411 (2004), programs.

In passing the Clear Air Act Amendments of 1977, Congress understood that the "maximum feasible protection of the public health" occurs only when sources of pollution were subjected to both the NSPS and PSD programs.[55] *CAA 1977 Legis. History* at 6634 (finding of the House Committee on Interstate and Foreign Commerce). It is illogical to interpret the term "modification" the same in both the PSD and NSPS programs, given Congress's understanding in 1977 that a new program – one specifically designed to protect public health and welfare in areas that had attained the NAAQS – was needed to supplement the NSPS program.

Because the NSPS program does not consider the site-specific air quality impacts of a source's emissions, 42 U.S.C. § 7411(b) (2004), prior to the PSD program, new

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[55] New source review ("NSR") was incorporated into the CAA in 1977 to prevent new or modified sources of pollution from increasing their emissions in a way that would further deteriorate air quality in a community. PSD (Part C) is one component of the NSR program and applies to new or modified sources in areas that are in attainment with the NAAQS. The other component of NSR is nonattainment NSR (Part D), which provides emission requirements for new or modified sources in areas that have not attained the NAAQS. *See New York v. U.S. Environmental Protection Agency*, 413 F.3d 3 at 12-13 (describing NSR program).

and modified coal-fired power plants located in relatively unpolluted areas could comply with NSPS and still emit enough pollution to degrade local air quality, *CAA 1977 Legis. History* at 723-28 (statements of Sen. Muskie, chief Senate sponsor of the 1977 amendments). *See also Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 904 (7th Cir. 1990) (noting that the NSPS program had "varying degrees of success in controlling pollution in different parts of the country"). Accordingly, Congress enacted the PSD program "to protect the public's health" by ensuring that emissions from new and modified facilities located in "so-called clean air areas" would not cause regional air quality to decline to the minimum level permitted under the NAAQS. *CAA 1977 Legis. History* at 6634 (statement of the House Committee on Interstate and Foreign Commerce).

Instead of requiring a PSD permit for any physical or operational change in an emitting facility that would result in a significant net increase in the *annual* emissions of regulated pollutants, 40 C.F.R. § 51.166(b) (2005) (regulatory definition of PSD "modification"), the Fourth Circuit's ruling would require a PSD permit only when a physical or operational change results in an increase in the facility's *hourly rate* of pollution emissions, 40 C.F.R. § 60.14(a) (2005) (regulatory definition of NSPS "modification"). Under such a rule, old coal-fired power plants could undergo refurbishment projects that markedly increase their overall annual emissions and further degrade air quality without receiving a permit from EPA, so long as the plants' hourly rate of emissions remain the same. The resulting public health harms and social welfare costs, *see generally* discussion § I, *supra*, are antithetical to the

CAA's central goal of protecting public health and welfare by improving air quality.

The modifications of the Duke coal-fired power plants at issue in this case are just the type of projects that Congress intended to be subject to the PSD program. While the refurbished Duke facilities have not increased their hourly rate of emissions under the NSPS program, they are located in NAAQS attainment areas and, under the challenged regulation, would have been required to install additional PSD pollution controls to decrease the total amount of pollution the upgraded EGUs will emit to the surrounding area.[56] Such controls would improve, or at least maintain, the overall air quality in the areas surrounding and downwind of the plants, as well as prevent exacerbation of the severe health effects of air pollution already experienced by people in the Carolinas and beyond. *See* discussion § I(E), *supra*; *see also CAA 1977 Legis. History* at 4950 (Statement of Sen. Buckley) (noting that the PSD program "lessens the danger that an upwind State will impose its pollution on a neighbor") and 4525 (statement of Sen. Muskie) (discussing concern of the National Academy of Sciences "that emissions 300-miles upwind could still contribute to problems in major cities").

Allowing old coal-fired power plants to undertake major renovations without being required to install the

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[56] Refurbished coal-fired plants will increase the amount of pollution emitted to the atmosphere by extending their operating life, thus forestalling the construction of new coal-fired plants that would be subject to more stringent CAA emission requirements. Additionally, since it also may make more economic sense to use refurbished plants as base load sources of electric power rather than for peaking purposes, there will be emissions of harmful air pollutants for more hours per day and/or during off-peak hours, when before there had been none.

more stringent pollution controls mandated by the PSD program undermines Congress's goal of protecting public health and welfare from increased air pollution. Long-term increases in air pollution will occur when a deteriorated Duke EGU is refurbished to extend its operational life for another 20 years, thereby raising the levels of PM and ozone in the air and increasing the risk of premature death in adults and asthma hospitalizations for children exposed to emissions from the plant. *See* discussion § I(A) and (B)(1), *supra*. Even short-term increases in pollution emissions, such as might occur when a Duke coal-fired power plant operates a few hours longer each day than it did prior to renovations, lead to increases in respiratory diseases in children exposed to NO_x, as well as rapidly worsened asthma for people exposed to SO_2. *See* discussion § I(B)(2) and (C), *supra*.

In addition, overall degradation of air quality due to the increased emissions from the refurbished Duke power plants could cause more missed school days for asthmatic children and more lost work days for adults, particularly in the Carolinas. *See* discussion § I(D) and (E), *supra*. Thus, the Fourth Circuit's ruling would inhibit, instead of promote, the "productive capacity" of the surrounding community. 42 U.S.C. § 7401(b)(1) (2004).

Allowing coal-fired power plants to undergo changes that increase their net annual emission of pollution without undergoing PSD review contravenes the legislative purpose of the PSD program – to *prevent* deterioration of air quality in order to protect public health and welfare better. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 401 (D.C. Cir. 1979) (finding that the intent of the PSD provisions "is succinctly stated by the title of that part: 'Prevention of Significant Deterioration of Air Quality'") (citing 42

U.S.C. § 7470). The occurrence and severity of adverse health effects caused by air pollution, and the economic and social welfare costs that accompany them, are directly related to the total amount of harmful pollutants inhaled. *See generally* discussion § I, *supra*. Accordingly, the goals of the CAA are best implemented though programs that reduce the overall emission of harmful pollutants. Contrary to the Fourth Circuit's holding, Congress has clearly enacted, and EPA has correctly implemented, a PSD program that serves to protect the public health and welfare from the harms of increased air pollution.

CONCLUSION

For the foregoing reasons, the Court should reverse the Fourth Circuit Court of Appeals' decision.

Respectfully submitted,

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ENVIRONMENTAL DEFENSE, ET AL.,
Petitioners,
v.
DUKE ENERGY CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICI CURIAE* OF THE AMERICAN PUBLIC POWER ASSOCIATION AND THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION IN SUPPORT OF RESPONDENT DUKE ENERGY

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BRIEF *AMICI CURIAE* OF THE AMERICAN PUBLIC POWER ASSOCIATION AND THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION

All parties consent to the filing of this brief.[1]

STATEMENT OF INTEREST OF *AMICI CURIAE*

Created in 1940 as a non-profit, non-partisan organization, *amicus curiae* the American Public Power Association (APPA) is the service organization for the nation's more than

[1] No party or its counsel authored this brief in whole or in part nor made a monetary contribution to *amici* for the preparation or submission of it. This brief is filed with the written consent of all parties pursuant to Rule 37.3(a). Copies of the requisite consent letters have been filed with the Clerk.

2,000 community-owned and community-operated electric utilities that serve more than 43 million Americans in 49 states or approximately 14 percent of the nation's electricity customers. 1,400 of the 2,011 public power systems in the United States serve communities with populations of 10,000 or fewer. Thirty percent or 29,175 MW [2] of APPA's members' power generating capacity is coal-fired.

Although the vast majority of the public power systems is owned by cities and towns, a number of counties, public utility districts and even a handful of states have public power systems. Most public power systems, especially the smaller ones, are governed by a city council, while others are overseen by an independently elected or appointed board.

Public power has a strong environmental protection record and a reputation for reliable and affordable power service. APPA's mission is to assist its members in ensuring that adequate, reliable electricity is available to their customers at a reasonable price while protecting the environment.

Amicus curiae the National Rural Electric Cooperative Association (NRECA) was formed in 1942 by the nation's rural electric cooperative leaders dedicated to electrifying vast regions of the country and providing reliable and affordable electric power through electric cooperative entities. Today, NRECA serves as the national service organization for 930 not-for-profit rural electric cooperatives that provide electric service to 39 million Americans in 47 states. Each electric cooperative is incorporated as a private entity in the state in which it resides and has a legal obligation to provide

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[2] "Megawatt" or "MW" is used to describe the electric generating (output) capacity of a facility. Another measure of capacity used by utility engineers describes the capability of a unit to burn fuel (*i.e.*, its heat input capacity) and is expressed in terms of million British Thermal Units (mmBtu) per hour. Because unit emissions are directly related to the amount and type of fuel burned in that unit, a unit's capacity to emit is directly related to the unit's heat input capacity.

reliable electric service to its customer-members. Collectively, cooperatives serve all or portions of 2,500 of the nation's 3,128 counties and their service areas cover 75 percent of the U.S. landmass.

The scarcity of reliable and affordable electric power in many regions of the United States in the late 1960's created a need for cooperative self-generation of electric power. Today, sixty-five rural electric generating and transmission cooperatives (G&Ts), which are owned by the distribution cooperatives they serve, generate and transmit power to 670 of the 865 distribution cooperatives. Overall, cooperative G&T generation produces 41 percent of all distribution cooperative needs. The need to provide reliable, primary (baseload) and affordable electric power effectively dictated coal as the fuel of necessity rather than natural gas and nuclear power. Presently, 80 percent of NRECA's members' cooperative generation or 23,000 MW is coal-fired. The remaining distribution cooperatives receive power directly from other generation sources within the electric utility sector, a significant portion of which also originates from coal-fired generation.

NRECA's cooperative members are dedicated to offering their member-consumers a broad array of electric generation choices including "green power." Today, about two-thirds of the cooperatives offer a green or renewable power option. The majority of this generation is by wind or biomass.

Amici curiae, who are owned by their communities or customers, represent smaller electric generating entities.[3] Collectively, *amici curiae* comprise a significant portion of the electric generation and distribution industry which, in turn, serves over 25 percent of electricity customers and over 80 percent of the landmass in the United States. For this

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[3] Over 95 percent of the members of APPA and NRECA are considered "small entities" under the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801 *et seq.*

reason, *amici curiae* provide a unique and invaluable perspective on the effect that the Environmental Protection Agency's (EPA's) enforcement interpretation of New Source Review (NSR) can have on the ability to supply reliable and affordable electric service throughout the United States.

SUMMARY OF ARGUMENT

Requiring NSR permitting under EPA's NSR enforcement interpretation when a small electric utility merely takes a boiler offline to undertake the repair or replacement of a broken component without increasing the unit's permitted capacity to emit (*i.e.*, its emissions rate, unaffected by hours of operation, or its hourly maximum achievable emissions rate) is inconsistent with the Clean Air Act, 42 U.S.C. 7401 *et seq.* (CAA).[4] It also would be costly, potentially financially crippling and environmentally unnecessary for small public and rural electric generating systems that service a significant portion of the U. S. population and landmass. Accordingly, to ensure that these smaller utilities can continue to meet their duty to provide reliable and affordable electric service, this Court should affirm the decision of the United States Court of Appeals for the Fourth Circuit in *United States v. Duke Energy Corp.*, 411 F.3d 539 (4th Cir. 2005).

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[4] *Amici curiae*'s primary purpose in filing this brief is not to repeat the reasons why EPA's position is inconsistent with the letter and the spirit of the CAA. Instead, *amici curiae* can provide the Court with insight into the practical effect of the position advocated by Petitioners and EPA.

ARGUMENT

I. REQUIRING NSR PERMITTING, A LENGTHY AND COSTLY PROCESS, FOR REPAIRS THAT DO NOT INCREASE A FACILITY'S ACHIEVABLE HOURLY EMISSIONS RATE WOULD SERIOUSLY IMPEDE THE ABILITY OF PUBLIC AND RURAL COOPERATIVE GENERATING SYSTEMS TO SUPPLY RELIABLE AND AFFORDABLE ELECTRIC POWER.

A. Public Power and the Nation's Electric Cooperatives Have a Duty to Provide Reliable and Affordable Electric Service.

Public power and electric cooperatives have a duty to provide reliable and affordable electric service to their customers. That duty to serve their constituents comes from state statutes and common law that require the public power systems [5] and cooperatives [6] to provide an adequate, dependable and economical supply of electric power.[7]

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[5] *See, e.g.*, Ga. Code Ann. §46-3-125 (public power authority is charged with taking all "necessary or desirable action in order to provide or make available an adequate, dependable, and economical supply of electric power and energy and related services"), Miss. Code Ann. §77-5-703(c)(municipalities owning electric generation and/or distribution systems have obligation to provide most adequate, reliable and economical source of electric power), Neb. Rev. Stat. §70-1403 (public power has obligation to provide adequate, reliable and economical source of electric power).

[6] *See, e.g.*, Conn. Gen. Stat. Ann. §29-20-108 (municipal electric utilities can form cooperative public corporations to provide efficient, low cost and reliable electric power), La. Rev. Stat. Ann. §33-4545-2 (power authority authorized to cooperate with electric power cooperative associations to ensure an adequate, reliable and economical supply of electric power), Mass. Gen. Laws ch. 164,

B. Small Electric Generating Systems Often Rely On Just a Few Units and Must Be Able to Make Repairs to a Unit Without Taking that Unit Offline For an Extended Period of Time.

Many factors affect the amount of actual electric generation produced by steam from a boiler or "emissions unit" of a coal-fired electric generator – seasonal fluctuations in electric demand, the availability of other units in the system, the cost of one unit's generation relative to other units, the cost of electricity from other producers and even the annual rainfall, which affects the availability of electricity from hydroelectric power plants, which, in turn, affects the demand for electricity from fossil fuel electric generating units. A planned or forced[8] outage at one unit in the system will require immediate increased production at another unit within the system or region.

From time to time, public power and the electric cooperatives must take a unit offline to make a repair. Such a repair characteristically involves replacing a failed or worn component with a new or refurbished one. Typical examples of repair work to a coal-fired electric generating boiler are replacing steam tubing, water pumps and valves. These types of repairs allow the generating unit to maintain its full, legal, operational capabilities. EPA's position in the case before this Court is that many common (and often minor)

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§47C (municipal plant may form cooperative to provide efficient, low cost and reliable electric power).

[7] The cooperatives also have additional duties to serve originating from service agreements with consumers, corporate bylaws and articles of incorporation and, for those who acquire financing from the federal government, provisions in associated loan agreements.

[8] Forced outages are unanticipated and/or unplanned periods when a boiler is brought offline to perform necessary repairs.

repairs to units trigger NSR because they are physical changes that allow the facility to increase its hours of operation to levels that the unit was capable of achieving or had achieved in the past.

Although the larger electric generating systems have dozens of units that are subject to the CAA's NSR program, public power and rural electric cooperative power systems frequently have only a single commercial-sized coal-fired unit that serves thirty to fifty percent (or in some instances 100 percent) of the system's electric load. For example, 75 percent of all cooperative generators have a single coal unit that represents over twenty percent of all the electricity sold. Twenty-five percent of all cooperative generators have a single unit that represents thirty-three percent of all electricity sold. These small systems cannot take a unit offline a moment longer than necessary to make a repair without incurring potentially huge financial impacts if substitute power must be purchased on the wholesale market.

C. Requiring NSR Permitting For Repairs That Do Not Increase Achievable Hourly Emission Rates Would Present Small Utilities With a Hobson's Choice.

A forced outage in an electric generating system requires fast and deliberate action. The stakes are particularly high for smaller systems because, as noted above, a major portion of the system's ability to provide electric power to its consumers is no longer available. Unfortunately, under the position advocated by Petitioners, when a small system makes a repair that does not increase the unit's achievable hourly emissions rate but may allow the unit to increase utilization of existing capacity within permit limits, it will be faced with three equally untenable choices: (1) Obtain an NSR permit which takes on average 18 months, which would not be a feasible response to an immediate forced outage;

(2) Go through a CAA permitting process and obtain a "synthetic minor" permit[9] that effectively imposes permanent legal limits on the unit's operations, which process also cannot be completed expeditiously;[10] or (3) Conclude that no NSR permit is required (for example through a complicated and uncertain "actual-to-projected actual" emissions increase analysis) and risk enforcement action including massive civil liability to the utility and potential personal criminal liability to the responsible owner and/or operator if, after retrospective review, the regulatory agency believes that NSR was applicable.

Under EPA's enforcement interpretation, during any planned or forced outage, an operator must determine if a repair will trigger NSR applicability. In many cases, even with a planned outage, the actual physical repairs required are not ascertainable until the unit is actually offline and the internal parts exposed and examined by utility personnel. This NSR applicability determination can be extremely time-consuming, complex and uncertain, given varying interpretations posited by EPA over the years as well as in this case.

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[9] A CAA permitting process in which a utility obtains a synthetic minor permit is a process in which the unit's operator voluntarily imposes new lower legal limits on the unit's allowable emissions, which in most cases results in limiting the total number of hours the unit is allowed to operate in a year.

[10] A unit may be forced to accept a permit limit on its hours of operation because the approval and installation of Best Available Control Technology (BACT) emission controls is not a feasible response to a forced outage that needs immediate repair. Although usually shorter than the 18 or more months required to obtain an NSR BACT permit, depending on the jurisdiction, such a synthetic minor permit still requires a minimum 30 – 180 day public review period.

1. The NSR Permitting Process is Expensive, Time-consuming and Often Not Feasible.

The NSR review process consists of the preparation and submission of a permit application by the owner/operator of the unit, followed by an extensive review of the application by the state and/or federal permitting authority. The application includes an assessment of the air quality impact of the proposed major modification, an assessment of its potential effect on national parks or wilderness areas and an assessment of retrofitted pollution controls called the best available control technology (BACT) analysis. This review can take up to two years or more. Many states, in implementing Federal Clean Air Act requirements,[11] provide for a 30-day application completeness review, a 60-day agency technical review, a 30-day public comment period and a 30-day period for a public hearing. In some instances, the 30-day completeness review re-starts if application deficiencies are later identified. The BACT determination is one of the most complex portions of the NSR process involving a technical feasibility evaluation of alternative emissions control technologies, cost evaluations of each technology alternative and an assessment of the environmental and energy impacts of each alternative. Thus, the time period from submission of the application to approval of the permit is typically 18 to 22 months. *See, e.g., Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461, 515 (2004)(process took 18 months). Even EPA in its report to President Bush on NSR admitted that the entire NSR permit process typically lasts between 7 to 22 months. *EPA New Source Review: Report to the President* (2002).

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[11] These requirements are implemented through CAA State Implementation Plans (SIPs).

This period does not include the time necessary to prepare the application (which can take six months or more) or to install any resulting controls, which could take years. Even a NSR non-applicability determination typically takes 18 months. If, in order to undertake common repair and replacement projects, a small utility is faced with the time it takes to prepare an NSR application, complete the permitting process, defend legal challenges to the permit and retrofit any required controls, that small utility may be unable to serve its customers and, accordingly, may have to forgo such projects.

The NSR permitting process is not only expensive[12] and time-consuming, but the resulting controls can add tens of millions of dollars in capital installation and annual operating costs to a system. Moreover, during NSR applicability determinations and permitting review, a public or cooperative utility may not be able to provide electricity to its consumers with existing generating capacity within its system, and thus may be forced to buy substitute power from others at uncertain and usually high wholesale market rates.

For all of these reasons, *amici curiae* are extremely concerned because repairs that only maintain a unit's full operational capabilities, but do not increase a unit's maximum hourly achievable emission rate would require NSR permitting under the position now advocated by EPA and Petitioners. It is difficult to believe that, by means of a technical amendment in 1977, Congress intended to expand the NSR program so radically and to create such a regulatory obstacle to the supply of reliable and affordable electricity to millions of households across the nation. Indeed, EPA's own interpretation and implementation of the program for nearly two decades never suggested that NSR could be triggered by common repairs that merely maintained a facility's operating

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[12] The air permitting application can cost as much as $500,000, including an assessment of BACT that can cost between $15,000 and $50,000.

capabilities without increasing the facility's maximum hourly emissions rate.

2. Obtaining a Synthetic Minor Permit is Not a Rational, Economically Feasible or Financially Prudent Alternative.

Petitioners suggest that one viable option to avoid the full NSR permitting process is to limit future potential annual emissions to significant emissions increase levels[13] above representative past emissions by obtaining a synthetic minor permit. This approach is not at all viable. Avoiding the lengthy NSR permitting process by artificially limiting unit utilization would be an enormously expensive and unwise alternative and is not contemplated by EPA's regulations. *See Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 917 n.13 (7th Cir. 1990).

Generating units are utilized or "dispatched" in order of lowest to highest unit operating costs. Even "baseload" coal-fired utility units rarely operate at more than 80% of annual capacity factor.[14] Lesser utilized or "intermediate load" units operate at lower annual capacity factors but must be available to meet increasing electric demand during times of peak usage within the year or long-term outages of baseload units. In addition, many electric generating units are designed to meet both current and future customer electricity demands on utility systems and thus may not be operated at full operational capacity for a number of years until electricity demand grows. In such cases, these intermediate load units

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[13] The NSR definition of a significant increase for SO2, NO_x and volatile organic compounds (VOC) is 40 tons but other significance levels vary. 40 C.F.R. §52.21(b)(23).

[14] "Capacity factor" is the ratio of actual MWH generated in a year by the unit to the MWH that would be generated if the unit operated continuously at maximum output.

will be ramping up to baseload use. Likewise, some units may go for years with very minimal operation in areas of the county where hydro-electric power is the baseload economic choice and rainfall is adequate for years or even decades.

Under Petitioners' formulation, each time an operator makes a repair and accepts a synthetic minor NSR permit limit, it would have to restrict annual future usage based on its recent historic levels of operations to avoid the full NSR permitting process. Under the most recent NSR permitting process, typically a unit's future operation under a synthetic minor permit would be limited to an annual average emission based on the 24 consecutive months of highest operation over the previous five years. Thus, a small system with a unit under a synthetic minor permit limit loses its ability to use its needed and otherwise available and already permitted excess capability, and faces financially difficult choices in replacing that lost generation.

Taking a synthetic minor permit in response to a physical change in lieu of full NSR permitting may appear to be the most expedient option. This alternative, however, is typically very expensive. To demonstrate, NRECA aggregated for all cooperative coal-fired generating units the difference between their presently permitted electric generation (including annual emissions) and their generation (including annual emissions) if each unit were limited to its annual generation average of the highest 24 consecutive months within the five years from 2000 to 2004 using U.S. Department of Energy, Energy Information Administration (EIA) official data (Form 767). Summing this information for all cooperative units results in a combined generation loss of 18.28 percent. Stated differently, of the 23,089 MW of NECRA member cooperative coal-fired capacity legally available, the synthetic minor limitations would result in the

equivalent of over a 4,220 MW loss,[15] which equates to effectively eliminating over seven large commercial generating units, representing over $7 billion in replacement coal-fired generation.[16] This lost generation capacity would be enough to provide electricity to over 3.3 million residential homes.[17]

This loss of over 18 percent of cooperative generation capacity that would result if Petitioners' view of NSR were the law simply is not a viable option for small electric systems and cannot be justified to the customers of a public power system or to the members of a not-for-profit cooperative. The diminished unit availability would impact capital cost recovery, negatively affect financial credit ratings, and increase rates as additional generation facilities or the purchase of substitute power would be needed to make up for the lost generation capacities. Thus, synthetic minor permitting is not a rational, economically feasible or financially prudent alternative for the communities that own public power and for the consumers that own cooperative systems. This result certainly could not have been what Congress intended.

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[15] Technically, the loss is not one of capacity (MW), but one of generation output, best expressed in a megawatt-hour (MWh) metric. The MW capacity loss cited here is derived by dividing the MWh loss by 8,760, the total number of hours in a year.

[16] The replacement generation cost estimate of $1,700/KW (kilowatt) installed capacity is based on Department of Energy, Energy Information Administration (EIA) estimated "overnight cost" of new coal-fired generating adjusted to include a 10 percent contingency factor reflecting change orders in contracts during construction, a 4 percent real dollar increase in materials and labor, and a 7 percent cost of financing during five years of construction.

[17] This calculation is based on average sales to residential consumers based on EIA Electric Sales Revenue and Price, 2004 publication.

3. For Even a Short Period, the Cost of Replacement Power During NSR Permitting Could Be Crippling For Many Public Power and Rural Cooperative Systems.

The cost of replacement power purchased on the spot wholesale electricity market can be considerably more expensive than the power produced by a utility's own generating facilities because the price of substitute generation is market-based. The difference between the small utility's own generation cost and the price of substitute generation purchased on the wholesale market is especially exacerbated at times of peak demand such as during summer or winter because the wholesale market price of electricity is based on the cost of the last and most expensive generation, *i.e.*, the last to dispatch in the region. One large APPA member in the West has seen the market price of wholesale electricity range from $50 to $400 per MWH during summer hours or other high load periods – a 700% price differential.

To illustrate the financial impact of the high cost of replacement power, for every twenty-four hour day a baseload commercially sized 600 MW unit is offline, the difference between the cost of replacement power and the cost of power generated by the unit can easily amount to $576,000 per day, over a 330% increase.[18] Taking a

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[18] This result comes from standard engineering calculations assuming 80% annual capacity usage of the 600 MW unit and 8,760 hours in a year. Baseload generation costs of $15/Mwh, a realistic conservative average, and replacement power costs of $65/MWh were used. The replacement power cost is also a conservative estimate based on the average future prices derived from the five regional electricity trading hubs of PJM, Cinergy, Entergy, ERCOT, and Palo Verde over the twenty-month forward period beginning on August 2006. This information is provided by the energy brokers Amerax, Preban and TFS; and pricing reports in Platt's Megawatt Daily and NYMEX. Transmission costs, which can be very substantial, were excluded from this calculation.

synthetic minor permit for the unit assuming an 18% loss of capacity, a likely reduction discussed earlier, would cost the small utility over $70 million for the first 18 months for substitute power. This last figure, however, ignores the costs of supplying power after the initial 18-month period. To replace the 18% loss of capacity quickly, in 18 months, gas generation would likely be constructed or purchased, resulting in an additional cost of almost $69 million, [19] making the combined costs of supplying substitute generation while other generation is built plus the new generation total $139 million. Thus, in taking a commercial unit offline in a public power or cooperative system for even a few months while that system seeks an NSR permit, an NSR applicability determination or even a synthetic minor permit, the system would have to purchase replacement power at significantly higher prices and, ultimately, a significant rate increase could be necessary to cover the higher cost of purchased power and potentially building new power. Depending on the relative financial impact, credit ratings and potentially even the financial stability of these small systems could be very negatively affected.

Thus, during the 18-month NSR permitting process (or even in the synthetic minor permitting process), the small system would be forced to purchase replacement power in the wholesale market, which, depending on the prevailing rates, could spell severe economic problems for the system. Moreover, accepting an artificial cap on operations by means of a synthetic minor permit and operating well below

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[19] This calculation assumes combined cycle gas generation capital costs of $625/KW based on the EIA 2006 Annual Energy Outlook. The unit could be permitted in an expedited process as a Clean Air Act minor source and built in only 18 months. The calculation does not reflect the actual cost of power generation from this type of gas unit; it reflects only construction cost. Considering historically high natural gas prices, the overall cost of generating power from this unit operation would be considerably higher than the coal–fired generation it would replace.

capacity - - which systems might be forced to do - - would significantly impair the capital of the system.

Faced with these obstacles, under Petitioners' view, small generating systems would find it difficult, if not impossible, to meet their obligation to provide reliable and affordable electric service. Congress hardly could have intended to require small systems to undergo the lengthy and costly NSR permitting process every time they made a repair to a unit that did not increase its maximum achievable hourly emissions rate, and EPA could not have done so in its regulations without disclosing the extraordinary expansion of the NSR program it was contemplating and assessing the equally extraordinary economic impact of such an expansion. Yet, when it promulgated the 1980 NSR Rules, EPA's economic assessment showed no such expansion. *See* 45 Fed. Reg. 52,676, 52,729 (Aug. 7, 1980).

4. Requiring NSR Permitting For Repairs That Do Not Increase a Unit's Achievable Hourly Emissions Rate Would Subject Small Utilities to Constant NSR Permitting or Compromise of Capacity.

The problems generated by subjecting units to the NSR permitting process for repairs that do not increase the unit's maximum achievable hourly emissions rate are multiplied by the frequent shifts in generation loads or hours of operation of a unit within a small system. As set forth above, numerous planned and unplanned factors, including seasonal demand, forced outages and rainfall, affect the usage of a unit. If small utilities are required to go through the NSR review process for common repairs, such as those targeted by EPA in the NSR enforcement initiative, small utilities will be in a constant NSR permitting cycle.

Under EPA's enforcement interpretation, every repair or replacement of a component such as a tube assembly, pump

or valve - - which occurs frequently over the life of a generation unit - - would put the operator in the same predicament – undergo a lengthy NSR permitting process and install controls or limit capacity. If the utility chooses the more expedient option of a synthetic minor permit, it will find itself in a downward spiral, successively limiting its operations further and further below its permitted, full operational capabilities.

The dilemma faced by a small electric system contemplating repairs to a unit is exacerbated by the methodology for determining whether an annual emissions increase would occur if that methodology requires a "projection" of likely future utilization within permitted capacity. Such a projection is, at best, fraught with complexity, subjectivity and uncertainty.[20]

In the enforcement cases, EPA posited an outcome-determinative methodology that assumes that whenever a component that caused forced outages in the past is repaired, the repair will inexorably lead to "recovered" utilization and thus an increase in hours of operation and, therefore, emissions. This approach is in contrast to the NSPS maximum hourly emissions test, which is purely an engineering evaluation of the fuel burning (and therefore emitting) capacity of the unit in question.

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[20] Any emissions increase test that is based on projected utilization requires seer-like knowledge because it must be applied at the time of the proposed project and prior to post-project operation, when it is impossible to predict all future unit operational parameters that may affect emissions. For example, fuel characteristics such as inherent sulfur concentrations can vary unpredictably over time, resulting in annual unit emissions increases unrelated to any physical change; and seasonal generation demands on the unit due to weather or unit outages can force a greater operational burden on the unit than predicted. Additionally, many other unforeseeable factors can cause subtle unit emission increases unrelated to any physical change.

Thus, small utilities in particular will face significant uncertainty and expense because an NSR applicability determination implicates systems having only several units whose annual production and operating hours vary considerably as these units experience differing maintenance outage times and production rates to meet dispatch obligations on a year-to-year basis. The position advocated by EPA and Petitioners, which is not consistent with the requirement for a "modification" as determined under the New Source Performance Standards (NSPS), will make it impossible for small electric utilities to maintain their units as required or make desirable efficiency improvements. Operators will hesitate to take units offline to replace components to maintain unit performance because of the complicated analysis that would have to be performed to make an educated guess as to the risk that the repair will trigger NSR review - - a complicated analysis that is always subject to second-guessing because no one can accurately predict how the myriad of factors that affect the utilization of one unit within the system will change in the future.

Certainly, Congress could not have intended to subject small electric systems to such expense and uncertainty every time a unit undertakes the type of projects targeted in EPA's enforcement initiative. Yet, this will be precisely the result so long as the test required for NSR applicability is not keyed to a repair that actually increases a unit's maximum achievable hourly emissions rate.

5. The Potential Liability For Public Power and Cooperatives is Great.

If an operator errs in forgoing NSR permitting, the potential CAA liability is $32,500 per day per occurrence (i.e., per pollutant). If sulfur dioxide (SO_2) and nitrogen oxides (NO_x) triggered NSR review but the utility failed to

realize it for a year [21], the potential liability for noncompliance is $23,725,000 (365 x 2 x $32,500). 42 U.S.C. §7413(b). The utility could also face injunctive relief, including the cost of BACT, as well as potential personal liability.

Subjecting small utilities to the NSR applicability process for a mere increase in hours of operation after a common repair creates uncertainty over whether NSR permitting is required. Cooperatives and public power systems selecting any one of the Hobson's alternatives would face significant financial burdens because of loss of ability to utilize full generation capabilities of units that have required very significant capital investments, as well as additional costs to provide substitute generation to avoid abrogating their duty to their customers to provide reliable and affordable electric service.

II. USE OF THE NSPS DEFINITION OF "MODIFICATION" WILL NOT CIRCUMVENT CONGRESS' INTENT TO REQUIRE EMISSIONS REDUCTIONS NECESSARY TO MEET CAA HEALTH, WELFARE AND ENVIRONMENTAL GOALS.

Contrary to Petitioners' claims, rejection of EPA's enforcement interpretation will not circumvent Congress' intent to require emissions reductions necessary to meet CAA health, welfare and environmental goals. A significant portion of public power and cooperative coal-fired generation already meets NSPS requirements and/or has been through

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[21] As discussed in *Alabama Power v. Costle*, 636 F.2d 323, 401 (D.C. Cir. 1979), a facility's "net" emissions across all the units at a facility over a five-year contemporaneous period are considered. *See also, New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005).

New Source Review, and is equipped with modern pollution controls.

Over 60 percent of public power's coal-fired generation already meets applicable NSPS requirements under the CAA. Likewise, over 50 percent of cooperative coal-fired generation already meets applicable NSPS requirements under the CAA. Additionally, 20 percent of all cooperative generation has gone through NSR.

Moreover, even those units that have not been through any form of new source review are well-regulated and will continue to be subject to other, increasingly stringent CAA programs that ensure that these facilities are well-controlled without interfering with their duty to serve. For example, due to subsequent CAA regulatory mandates effectively forcing pollution control retrofits on the remaining and older cooperative units, 90% percent of cooperative generation using high sulfur coal is equipped with flue gas desulfurization (FGD) units to control sulfur dioxide (SO_2) emissions, the primary pollutant associated with coal-fired generation.[22] In addition, virtually all cooperative generating capacity in the Eastern United States, equaling about 6,000 MW, is also retrofitted with state-of-the-art nitrogen oxides (NO_x) controls, Selective Catalytic Reduction (SCRs), because of EPA's NO_x SIP Call requirements promulgated in 1998[23], to control Eastern ozone. Almost all cooperative coal-fired generation is also equipped with low-NO_x burner technology regardless of where the units are located.

Thus, even though much of cooperative and public power coal-fired generation is newer and/or equipped with state-of-the-art pollution controls, electric cooperative generation and public power units would still be subject to the lengthy and costly NSR applicability process under EPA's NSR

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[22]This number includes one commercially sized unit where the FGD retrofit is ongoing.

[23] *See* 63 Fed. Reg. 57356 (Oct. 27, 1998).

enforcement interpretation, which would jeopardize their ability to provide reliable and affordable electric service.

CONCLUSION

Under Petitioners' view of NSR, the operator of a small electric utility who merely needs to replace a broken part would be forced to endure a lengthy NSR process and to navigate through a test that is so complex, confusing and fraught with subjectivity that it has gone through years of EPA iterations, interpretations and court battles. For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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(22)

No. 05-848

IN THE

Supreme Court of the United States

ENVIRONMENTAL DEFENSE, *ET AL.*,

PETITIONERS,

v.

DUKE ENERGY CORPORATION,

RESPONDENT

On Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit

***AMICUS CURIAE* BRIEF OF APA WATCH IN SUPPORT OF RESPONDENT**

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INS v. Chadha, 462 U.S. 919 (1983) 18

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Louisiana Pub. Serv. Comm'n v. FCC,
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Martin v. Occupational Safety & Health Review Comm'n,
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Morton v. Mancari, 417 U.S. 535 (1974) 12

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) 19

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U.S. v. Duke Energy Corp.,
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40 C.F.R. §52.21(b)(21)(iv) 5
40 C.F.R. §52.21(b)(23) 3

Other Authorities

Robert A. Anthony, Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?, 41 DUKE L.J. 1311 (1992) 19

EDWIN BORCHARD, DECLARATORY JUDGMENTS (1941) 13

WILLIAM J. HUGHES, FEDERAL PRACTICE §25387 (1940 & Supp. 1945) 13

John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 COLUM. L. REV. 612 (1996) 15, 17-18

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae APA Watch is a nonprofit association dedicated to ensuring that federal, state, and local agencies comply with applicable rulemaking, information-dissemination, and information-quality requirements. On its own and through its membership, APA Watch devotes significant effort to combat federal agencies' amending regulations by memoranda and reinterpretation, without the notice-and-comment rulemaking required by the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA").

ISSUES PRESENTED

Through the decisions below, respondent Duke Energy Corporation ("Duke") prevailed in a civil enforcement action brought under the Clean Air Act, 42 U.S.C. §§7401-7671q, by the Environmental Protection Agency ("EPA") and petitioner environmentalist intervenors. *See* 42 U.S.C. §§7413(b)(1) (civil actions by EPA), 7604(a)(3) (citizen suits). As now before this Court, this case presents two questions:

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus curiae* states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the timely filing of all *amicus curiae* briefs in this matter. The parties' letters of consent have been lodged with the Clerk of the Court.

1. Do the decisions below contravene Clean Air Act §307(b)(2), which provides that EPA action that was reviewable under §307(b)(1) "shall not be subject to judicial review in civil or criminal proceedings for enforcement"?

2. If §307(b)(2) does not preclude courts' considering arguments on the proper interpretation of the applicable regulations, do Duke's actions at various power plants in the Carolinas qualify as "major modifications" that triggered review under the Clean Air Act's Prevention of Significant Deterioration ("PSD") permitting program?

STATEMENT OF FACTS

Amicus curiae APA Watch adopts the facts as reported by the Fourth Circuit, 411 F.3d at 544-45 (Pet. App. 5a-7a), and the district court, 278 F.Supp.2d at 622-26 (Pet. App. 23a-31a). The facts, however, are essentially irrelevant because EPA and the environmentalist intervenors have stipulated that Duke prevails under Duke's interpretation of the applicable regulations. 411 F.3d at 546 (Pet. App. 9a).

LEGAL BACKGROUND

As signaled in the Statement of Facts, *supra*, this litigation hinges on what the applicable regulations actually provide. Accordingly, this section reviews the history and text of the regulations and EPA's evolving interpretations.

For existing stationary sources like Duke's power plants here, PSD applicability turns initially on the definition of "modification." *See* 42 U.S.C. §§7479(2)(C) (adopting §111(a)(4)'s definition of modification for PSD permitting), 7411(a)(4) ("'modification' means any physical change in, or change in the method of operation of, a stationary source

which increases the amount of any air pollutant emitted by such source"). In *Alabama Power,* the reviewing court recognized that "alterations of almost any plant occur continuously; whether to replace depreciated capital goods, to keep pace with technological advances, or to respond to changing consumer demands." *Alabama Power Co. v. Costle,* 636 F.2d 323, 401 (D.C. Cir. 1979). To focus administrative and industry resources on those modifications that may significantly impact air quality, EPA established *de minimis* thresholds for the net emissions increases required to trigger PSD review. 40 C.F.R. §52.21(b)(2), (3), (23).

Although EPA's final 1978 PSD regulations had focused on source-wide uncontrolled potential emissions to determine whether "modifications" qualified as "major," EPA's final 1980 PSD rule "follow[ed] the lead" of the *Alabama Power* court to focus of the netting analysis to actual emissions, while continuing to require a "modification" as defined in §111(a)(4). *See* 45 Fed. Reg. at 52,700; *see also Alabama Power,* 636 F.2d at 353-55 (invalidating 1978 rule's thresholds for increases above source-wide uncontrolled potential emissions). In doing so, EPA recognized the harm of "paper offsets" that would set sources' baselines for netting too high (and thereby allow new or modified units to avoid triggering PSD by claiming credit for pollution reductions that had never actually occurred). *See* 45 Fed. Reg. at 52,700. Similarly, with respect to PSD increments, EPA explained that "it is unwise to restrict source growth based only on emissions that a source is permitted to emit but which, in many instances, have not been and are not likely to ever be emitted." 45 Fed. Reg. at 52,718. Accordingly, EPA recognized that "the most reasonable approach, consistent with the statute, is to use actual source emissions, to the extent possible," for both source-wide netting and for calculating PSD increment

consumption. *Id.*[2] In sum, EPA's 1980 actual-emission approach prevents both underregulation and overregulation.

To determine applicability under EPA's 1980 PSD regulations, therefore, "the first step... is to determine whether the physical or operational change in question would result in an increase in 'actual emissions'" (*i.e.*, whether the change qualifies as a "modification" under §111(a)(4)). 45 Fed. Reg. at 52,698.[3] If not, that ends the inquiry. *Id.* If so, the next step analyzes whether that modification qualifies as "major" based on a comparison of source-wide actual emissions before and after the physical or operational change. To conduct this netting analysis, the regulations rely upon a series of somewhat overlapping definitions for potential, allowable, and actual emissions. 40 C.F.R. §52.21(b)(4), (16), (21). For existing emitting units with source-specific allowable emissions for the unit, the permitting authority may assume that actual emissions equal

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[2] Although the quoted text concerns increment consumption, the preamble's "Modification" section refers to the "Increment Consumption" section "[f]or a fuller discussion of the concept of 'actual emissions.'" 45 Fed. Reg. at 52,699 (*i.e.*, the "actual emission" focus applies both to determining whether a major modification occurred and to calculating increment consumption).

[3] Certain physical and operational changes are not activities that can give rise to a "modification," including routine maintenance, repair and replacement and changes in the hours of operation, notwithstanding their effect on emissions. 40 C.F.R. §52.21(b)(2)(iii)(a), (b)(2)(iii)(f).

the unit-specific allowable emissions. 45 Fed. Reg. at 52,699, 52,718; 40 C.F.R. §52.21(b)(21)(iii). Otherwise, the analysis uses the pre-modification rate at which the unit actually emitted pollutants over a representative baseline. 40 C.F.R. §52.21(b)(21)(ii). For units that have not begun normal operations, the analysis assumes that actual emissions equal the controlled potential to emit. 40 C.F.R. §52.21(b)(21)(iv), (4). Consistent with *Alabama Power and* the 1980 rules, modified units that have commenced normal operations use an "actual-to-actual" netting test that relies on actual (or unit-specific allowable) emissions to calculate a net emissions increase.

In several PSD applicability determinations issued circa 1981-1983, Edward E. Reich, then Director of EPA's Division of Stationary Source Enforcement ("DSSE"), interpreted the PSD regulations consistently with the New Source Performance Standards ("NSPS") regulations issued to implement §111(a) and with EPA's actual-to-actual focus. *See, e.g.,* JA 23-37 (PSD applicability analyses by Mr. Reich); 43 Fed. Reg. 26,380, 26,396 (1978) (§169(2)(C) "in effect adopts the definition of 'modification' under [§111(a)] for purposes of PSD"). As the DSSE Director during the time relevant to this litigation, Mr. Reich played an integral and authoritative part in implementing EPA's PSD regulations. *See, e.g.,* JA 23-37 (PSD applicability analyses by Mr. Reich); *see also* 44 Fed. Reg. 54,109 (1979) (*Federal Register* notice publishing EPA's final agency action on PSD applicability question signed by Mr. Reich); *Potomac Elec.*

Power Co. v. EPA, 650 F.2d 509, 514-15 (4th Cir. 1981) (citing a memorandum by Mr. Reich as *EPA's* conclusion).[4]

Unfortunately for U.S. industry and unnecessarily for U.S. air quality, EPA has confounded the "modification" and "major modification" tests, advocating presumptive use of an "actual-to-potential" test to determine PSD applicability. *See Amici Curiae* Br. of Nat'l Parks Conservation Ass'n et al. at 6-7 & n.3.[5] Because it compares emissions from historic actual operations to fulltime future operations, EPA's actual-to-potential test finds PSD applicability whenever a source that operates less than fulltime (*i.e.*, less than 24 hours per day, 7 days per week) makes a physical or operational change that emits the *same rate* of pollutants as the pre-change unit. Indeed, if a unit operating at 50% capacity installs equipment that emits 25% less emissions, the actual-to-potential test would find an emissions increase because it compares 50% capacity at the original emission rate with

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[4] The efforts to characterize Mr. Reich as a low-level employee are simply revisionist history. Envtl. Def. Br. at 35 n.27; EPA Br. at 28. The record more than supports the district court's determination that Mr. Reich authoritatively expressed EPA's then-current interpretation, *see* 278 F.Supp.2d at 642 (Pet. App. 61a-62a); *cf.* 411 F.3d at 545-46 (Pet. App. 8a-9a), consistent with an unmodified part of EPA's 1978 PSD rulemaking.

[5] Prospectively from 1992, EPA added an "actual-to-representative-actual" test for electric utility steam generating units, but not for other source types. 57 Fed. Reg. 32,314 (1992).

100% capacity at the lower emission rate, notwithstanding that there is no "modification" within the meaning of §111(a)(4) and notwithstanding that the PSD (like NSPS) allows the facility to increase its hours of operation without triggering review. Thus, contrary to its originally characterizing this policy as "unwise," EPA now finds modifications "based only on emissions that a source is permitted to emit but which, in many instances, have not been and are not likely to ever be emitted." 45 Fed. Reg. at 52,718; *see also* note 2, *supra*. This EPA reinterpretation, if accepted, would cost billions of dollars in unnecessary pollution controls and relocation of facilities to escape the expenses associated with endless preconstruction permit proceedings.

SUMMARY OF ARGUMENT

On jurisdiction, §307 does not apply by its terms, §307 would not preclude Duke's arguments on the proper interpretation of the PSD regulations if it did apply, and §307 would be unconstitutional if it precluded Duke's arguments and thereby authorized EPA to amend the regulations via post-promulgation reinterpretation (Section I). On the merits, EPA's reinterpretation of its regulations does not warrant deference and *a fortiori* its reinterpretation of the applicable North and South Carolina PSD regulations would not warrant deference, even if EPA had authority unilaterally and summarily to reinterpret those states' regulations (Section II).

ARGUMENT

I. §307 DOES NOT PRECLUDE DUKE'S ARGUMENTS

On threshold jurisdictional questions, a party establishes the court's jurisdiction if the court would have jurisdiction *under that party's* interpretation of federal law, notwithstanding that the court may lack jurisdiction *under the adverse party's* interpretation. *Osborn v. Bank of U.S.*, 22 U.S. (7 Wheat.) 738, 822 (1824); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 492-93 (1983). At the jurisdictional threshold, this Court must assume that the applicable national and regional regulations bore Duke's proffered interpretation when promulgated in 1980 and 1982, respectively. Under that assumption, §307(b)(2) does not apply here, §307 would not prevent the Fourth Circuit's action if it did apply, and §307 would violate the Constitution if it allowed EPA summarily to amend regulations by reinterpreting them, without judicial recourse.

By way of background, §307(b)(1) provides for direct appellate review in the D.C. Circuit of "any... nationally applicable regulations promulgated[] or final action taken" by EPA, and for direct appellate review in the appropriate circuit of "locally or regionally applicable" EPA regulations and final actions. 42 U.S.C. §7607(b)(1).[6] Petitioners must

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[6] Locally or regionally applicable regulations or actions are reviewable in the D.C. Circuit if EPA's *Federal Register* notice publishes a finding that its regulation or action "is based on a determination of nationwide scope or effect." *Id.*

file their petition for review within 60 days of EPA's noticing the regulation or action in the *Federal Register* or, for petitions based on after-arising grounds, within 60 days after those grounds arise. *Id.* Section 307(b)(2) prohibits civil or criminal defendants' seeking judicial review of EPA actions reviewable under §307(b)(1) in the enforcement proceeding. 42 U.S.C. §7607(b)(2). Section 307(e) provides that nothing in the Clean Air Act authorizes judicial review of EPA regulations or orders, except as provided in §307. 42 U.S.C. §7607(e). Section 307(d)(1) exempts enumerated EPA regulations and other final actions from APA review, but that APA exclusion expressly does not apply to interpretive rules. 42 U.S.C. §7607(d)(1).

A. §307(b)(2) Does Not Apply

EPA argues that §307(b)(2) precludes review of the PSD rules because review was available under §307(b)(1), as evidenced by actual proceedings in the D.C. Circuit. EPA Br. at 14. Even assuming this to be true (and Duke disputes it) for the *national* PSD rules, EPA's argument is inapposite to the purported change to the *regional* PSD rules for North and South Carolina. Because it has not taken any action (other than this litigation) to amend the North or South Carolina PSD rules or assume federal enforcement, EPA cannot argue that review was available under §307(b)(1). *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 240-41 (1980) (filing complaint is not final agency action that triggers APA review); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001) ("phrase 'final action'... bears the same meaning in §307(b)(1) that it does under... 5 U.S.C. §704"). In any event, because EPA did not issue a *Federal Register* notice containing findings of national scope and effect, §307(b)(1) review would lie in the Fourth Circuit, not the D.C. Circuit.

Moreover, even as to the *national* rules, EPA, the intervenors, and their supporting *amici* misconstrue Duke's (and the Fourth Circuit's) arguments. Duke does not seek to review (*i.e.*, to invalidate) EPA's 1980 PSD rulemaking. Instead, Duke merely asked the courts below and asks this Court to interpret those regulations consistently with their promulgation and to ignore EPA's subsequent, inconsistent and procedurally invalid reinterpretations of those regulations.[7]

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[7] Significantly, review of EPA's reinterpretation based on correspondence with the Wisconsin Electric Power Company took place in the Seventh Circuit, not the D.C. Circuit. *Wisconsin Elec. Power. Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990) ("*WEPCO*"). Moreover, although the preambles to EPA's post-*WEPCO* PSD rulemaking discussed PSD generally, those preambles did not amend the PSD regulations except prospectively as specifically proposed and promulgated. *Nat'l Tour Brokers Ass'n v. U. S.*, 591 F.2d 896, 899 & nn.8-10 (D.C. Cir. 1978) (where self-described interpretive rule required notice-and-comment rulemaking, the fact that the agency provided notice and took comment does not satisfy the notice-and-comment rulemaking requirement); *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1323 (D.C. Cir. 1988) ("agency may not introduce a proposed rule in [the] crabwise fashion" of merely discussing the issue in the preamble to a rulemaking on another issue).

B. §307 Does Not Preclude Courts' Declaring Law

Assuming *arguendo* that §307(b)(2) applies here, federal courts outside the District of Columbia and this Court have authority to declare the law in the process of deciding a case or controversy properly before them.[8] Moreover, even if EPA's sovereign immunity would present an obstacle to a federal court's declaring the law, the environmentalist intervenors render sovereign immunity irrelevant.

APA and Declaratory Judgment Act

The federal-question statute, 28 U.S.C. §1331, provides subject-matter jurisdiction for nonstatutory review of federal agency action. *Califano v. Sanders*, 430 U.S. 99, 105 (1977) (1976 amendments to §1331 removed the amount-in-controversy threshold for "any [federal-question] action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity") (*quoting* Pub. L. 94-574, 90 Stat. 2721 (1976)); *Andrus v. Charlestone Stone Prod. Co.*, 436 U.S. 604, 608 n.6 (1978) ("Nor does it matter that the complaint does not... assert §1331(a) as a

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[8] Of course, to the extent that Duke could have brought an action directly in the Fourth Circuit under §307(b)(1) to challenge EPA's amendments by reinterpretation of the regionally applicable North or South Carolina PSD rules, the district court or this Court could transfer this action to the Fourth Circuit, 28 U.S.C. §1631 (court lacking subject-matter jurisdiction may transfer an action to a court that has subject-matter jurisdiction), which would produce the same result that the Fourth Circuit already has reached.

basis of jurisdiction, since the facts alleged in it are sufficient to establish such jurisdiction"); *Chrysler Corp. v. Brown,* 441 U.S. 281, 317 n.46 (1979) (§1331 provides subject-matter jurisdiction to review agency action).

In 1980, Congress amended §1331 to its current form, Pub. L. 96-486, §2(a), 94 Stat. 2369 (1980), but that amendment did not repeal §1331's 1976 amendment, relied on by *Sanders* and its progeny. H.R. REP. NO. 96-1461, at 3-4, *reprinted in* 1980 U.S.C.C.A.N. 5063, 5065; *Bowen v. Massachusetts,* 487 U.S. 879, 891 n.16 (1988); *U.S. v. Mitchell,* 463 U.S. 206, 227 & n.32 (1983); *cf. Morton v. Mancari,* 417 U.S. 535, 550 (1974) (repeal by implication is disfavored); *Schlesinger v. Councilman,* 420 U.S. 738, 752 (1975) ("'repeals by implication are disfavored,' and this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available"). Statutes that foreclose alternate forms of review use stronger language that §307(e). *Compare* 42 U.S.C. §405(h) ("[n]o action against the United States... or any officer... thereof shall be brought under section 1331 or 1346 of title 28 to recover on any claim arising under this subchapter") *with* 42 U.S.C. §7607(e) ("Nothing *in this chapter* shall be construed to authorize judicial review of [EPA] regulations or orders... under this chapter, except as provided in this section") (emphasis added); *cf. Heckler v. Ringer,* 466 U.S. 602, 616-17 (1984) (assuming without deciding that §405(h)'s exclusion of jurisdiction *under 28 U.S.C. §1331* does not foreclose jurisdiction *under 28 U.S.C. §1361*).

The APA waives sovereign immunity for equitable and declaratory relief against agency action, 5 U.S.C. §702, and requires courts to "decide all relevant questions of law, interpret... statutory provisions, and determine the meaning

or applicability of the terms of an agency action" 5 U.S.C. §706. In the absence or inadequacy of statutory review, the APA authorizes declaratory as well as injunctive relief, 5 U.S.C. §703, unless a "statute[] preclude[s] judicial review." 5 U.S.C. §701(a)(1). The Clean Air Act expressly exempts enumerated regulations and other final agency action from the APA, 42 U.S.C. §7607(d)(1) ("provisions of section 553 through 557 and section 706 of title 5 shall not... apply to actions to which this subsection [307(d)] applies"), but that exclusion expressly does not include *interpretive rules. See id.* ("subsection [307(d)] shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5"). Because no statute precludes their granting declaratory relief on the nugatory effect of EPA's reinterpretations, the courts below obviously have jurisdiction to declare the law.

The Declaratory Judgment Act, 28 U.S.C. §§2201-2202 ("DJA"), authorizes declaratory relief "whether or not further relief... could be sought." 28 U.S.C. §2201(a); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 70-71 n.15 (1978) ("While the [DJA] does not expand our jurisdiction, it expands the scope of available remedies" where plaintiffs sought declaratory relief that a statute was invalid as an alternate remedy to seeking compensation for a taking). Since 1976, §1331 has authorized DJA actions against federal officers, regardless of the amount in controversy. *Sanders*, 430 U.S. at 105 (quoted *supra*). Moreover, the availability of declaratory relief against federal officers predates the APA, WILLIAM J. HUGHES, FEDERAL PRACTICE §25387 (1940 & Supp. 1945); EDWIN BORCHARD, DECLARATORY JUDGMENTS, 787-88, 909-10 (1941), and the APA did not displace such relief, either as enacted in 1946 or as amended in 1976. *See* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY,

S. Doc. No. 248, 79th Cong., 2d Sess., at 37, 212, 276 (1946); 5 U.S.C. §559; *Darby v. Cisneros,* 509 U.S. 137, 153 (1993) (rejecting argument that 1976 APA amendments expanded APA's preclusion of review) (*citing* 5 U.S.C. §559 *and Dickinson v. Zurko,* 527 U.S. 150, 154-55 (1999)). Thus, even if the APA's adequate-remedy and preclusion-of-review provisions preclude declaratory relief *under the APA,* 5 U.S.C. §§704, 701(a)(1), Duke nonetheless could obtain that relief *under the DJA.*

Sovereign Immunity

Assuming *arguendo* that the APA neither provides judicial review (§706) nor waives sovereign immunity (§702), the United States' sovereign immunity would raise two interesting questions: (1) can a court grant declaratory relief against a federal agency in an enforcement action, if the United States has not waived sovereign immunity for such relief, and (2) if not, could Duke file a cross complaint against a relevant EPA officer to enable the court to grant declaratory or equitable relief for *ultra vires* conduct? Assuming again *arguendo* that the APA neither provides judicial review nor waives sovereign immunity, this Court should answer the foregoing questions (1) no, *U.S. v. U.S. Fidelity & Guar. Co.,* 309 U.S. 506, 513-14 (1940) ("suability of the United States..., whether directly or by cross-action, depends upon affirmative statutory authority"), and (2) yes, *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 689 (1949) ("where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions"). On balance, and providing that it follows the procedural prerequisites, Duke still could obtain a declaratory ruling against EPA or its officers that confines the PSD regulations consistently with the decisions below.

Even if this Court finds the APA's waiver of sovereign immunity not to apply and if Duke does not cross complain against an EPA officer, the presence of the environmentalist intervenors (who cannot assert sovereign immunity) renders sovereign immunity irrelevant here. Given that the courts below freely could enter declaratory relief against the environmentalist intervenors, *a fortiori* nothing precludes those courts' merely interpreting the applicable regulations consistently with EPA's contemporaneous interpretations and the Clean Air Act, as part of deciding litigation properly before them.

C. §307(b)(2) Is Unconstitutional as Applied

Allowing §307(b)(2) to preclude Duke's arguments here would allow an agency to enforce a procedurally invalid reinterpretation of its regulations over what the regulations actually provide. If the Constitution has any vitality against administrative overreaching, *see* John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 COLUM. L. REV. 612, 618 (1996) ("separation of powers doctrine includes the requirement of some minimum separation between lawmaking and law-exposition"), framing the question in that light answers the question: §307(b)(2) cannot prevent courts' interpreting duly promulgated regulations consistent with the agency's contemporaneous interpretations and rejecting the agency's subsequent, procedurally invalid amendments under the guise of interpretation.

II. POST-PROMULGATION REINTERPRETATIONS WARRANT LITTLE OR NO DEFERENCE

EPA concedes that Duke's interpretation is permissible, EPA Br. at 35, but contends that courts must defer to EPA's

current interpretation of the 1980 PSD regulations. *Id.* at 37. Because Duke interprets the regulations consistently with EPA's contemporaneous, authoritative interpretations of the PSD rules, however, courts cannot defer to EPA's amendatory, post-promulgation reinterpretation.

Instead, if EPA no longer approves of the regulations it promulgated in 1980, as correctly interpreted by the courts below and by EPA contemporaneously with their promulgation, EPA could initiate notice-and-comment rulemaking to amend the regulations. EPA cannot, however, simply amend those regulations by reinterpreting them. Moreover, even if EPA amends its *nationally applicable* PSD regulations, EPA nonetheless also would need to amend the *regionally applicable* PSD regulations for North and South Carolina before those changes prospectively would affect Duke's power plants in the Carolinas.

A. EPA Cannot Amend its Regulations by Reinterpretation

This section considers the deference that courts owe to EPA's current interpretation of the PSD regulations. Although interpretive rules may function as precedents, they do not enjoy *Chevron* status as a class. *U.S. v. Mead Corp.*, 533 U.S. 218, 232 (2001) (*citing Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984)). Unfortunately, the somewhat related *Seminole Rock* doctrine often leads courts to confer greater-than-*Chevron* deference to spurious, post-promulgation agency interpretations of vague agency regulations. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) ("ultimate criterion" for judicial construction of ambiguous regulation "is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation"); *Ehlert v. U.S.*, 402 U.S.

99, 105 (1971) (reviewing court must accept a "plausible construction of the… regulation"); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991); *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696-97 (1991). Whereas *Chevron* encourages legislators to "pass the buck" by enacting vague statutes for agencies to implement, *Seminole Rock* encourages agencies to "hide the ball" by promulgating vague regulations that they themselves authoritatively interpret, post-promulgation.

It does not matter whether agency personnel intentionally promulgate vague regulations to work mischief (*e.g.*, to accomplish by post-promulgation fiat what they could not accomplish in a rulemaking) or merely choose that course because of short resources or simple laziness. Nor does it matter here whether EPA officials knew they had changed prior interpretations or instead merely acted negligently, without institutional memory. The point is that *Seminole Rock* creates incentives inconsistent with transparent rulemaking in which the public has the notice that underlies the APA's concern for notice-and-comment rulemaking. *See* Manning, 96 COLUM. L. REV. at 655-57; *cf. Smiley v. Citibank (South Dakota), N. A.*, 517 U.S. 735, 741 (1996) ("notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation"). Moreover, the "general[] expect[ation that] an administrative regulation [will] declare any intention to pre-empt state law with some specificity… serves to ensure that States will be able to have a dialog with agencies regarding pre-emption decisions *ex ante* through the normal notice-and-comment procedures of the Administrative Procedure Act." *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 908-10 (2000) (interior citations omitted).

Even worse, the "*Seminole Rock* presumption – that an agency's delegated rulemaking power implicitly authorizes the agency to construe its own handiwork – contradicts [separation of powers,] a core structural commitment of our constitutional scheme." Manning, 96 COLUM. L. REV. at 639-40. The laxness of allowing executive agencies to serve in both lawmaking and law-exposition functions contrasts markedly with this Court's separation-of-powers jurisprudence. *Id.* at 651-53 (*citing INS v. Chadha*, 462 U.S. 919, 952-58 (1983), *Bowsher v. Synar*, 478 U.S. 714, 726 (1986), *and Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276-77 (1991)). Like Professor Manning, *id.* at 686-88, *amicus curiae* APA Watch urges the Court to replace *Seminole Rock* deference with *Skidmore* deference, judging an agency's interpretation of its regulations by the "thoroughness evident in the [agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Where Congress has delegated rulemaking authority to an agency, that agency either follows all applicable rulemaking requirements or acts *ultra vires* its delegated rulemaking authority. *Cf. Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (recognizing that "an agency literally has no power to act... unless and until Congress confers power upon it"). For that reason, whether it applies *Seminole Rock* or *Skidmore* deference to agency interpretations *generally*, this Court should grant no deference to agency interpretations that change (without explanation or notice-and-comment rulemaking) a prior agency interpretive or legislative rule. *See* 5 U.S.C. §551(5) (defining "rule making" as the agency process for amending

a rule); Robert A. Anthony, Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?, 41 DUKE L.J. 1311, 1355 (1992) ("[i]f a document expresses a change in substantive law or policy… [that] the agency intends to make binding, or administers with binding effect, the agency may not rely upon the statutory exemption for policy statements, but must observe the APA's legislative rulemaking procedures"); *see also, e.g., Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997); *Alaska Prof'l Hunters Ass'n, Inc., v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999); *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94-95 (D.C. Cir. 1997). Where an agency (like EPA here) purports to amend a rule without the required rulemaking, it acts *ultra vires*, and deserves no deference under either *Seminole Rock* or *Skidmore*.

The parties and other *amici* adequately cover the dispute over the permissibility of multiple meanings springing from the same definition. Even if it rejects the Fourth Circuit's holding that §111(a)(4) and §169(2)(C) create an un-rebuttable presumption that "modification" *must share* the same meaning for NSPS and PSD purposes, however, this Court nonetheless should fault EPA for reinterpreting the authoritative, contemporaneous interpretations that those terms *do share* the same meaning, 43 Fed. Reg. 26,380, 26,396 (1978) (quoted *supra*); JA 23-34 (PSD determinations circa 1981 and 1983), without any administrative process or explanation for the changed position. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (course change requires reasoned analysis beyond that required to act in the first instance). Having interpreted those provisions to share the same meaning, EPA's unexplained reversal should fall to

an *un-rebutted* presumption, even if it does not fall to the Fourth Circuit's *un-rebuttable* presumption.

B. EPA Cannot Amend the States' Regulations by Reinterpretation

Even if EPA could amend its PSD regulations by reinterpretation, EPA's reinterpretation many years later nonetheless would not retroactively amend the rulemakings that promulgated the North and South Carolina PSD rules *in 1982*. 47 Fed. Reg. 7836 (1982) (approving North Carolina PSD regulations); 47 Fed. Reg. 6017 (1982) (same for South Carolina). Such unilateral EPA action would violate both federalism and federal law.

First, if EPA no longer approves of the PSD regulations for North and South Carolina, EPA has ample prospective authority to prevent PSD violations and work with the states to correct their PSD rules. 42 U.S.C. §§7410(c), 7413(a)(5), 7477; *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 484 (2004). That federal-state disagreement, however, should not involve Duke's facilities or any other retrospective and long-ago permitting issues. *Alaska Dep't of Envtl. Conservation*, 540 U.S. at 502, 506-07, 518 (federalism concerns with EPA's overstepping state prerogatives under CAA) (Kennedy, J., dissenting); *Georgetown Univ. Hosp. v. Bowen*, 488 U.S. 204, 208-09 (1988) (absent an express delegation conferring it, federal agencies lack authority to issue retroactive regulations); *cf. Geier*, 529 U.S. at 908-10 (federal agencies expected to declare regulatory preemption with specificity through rulemaking process) (quoted *supra*); 42 U.S.C. §7401(a)(3) (state and local government bear primary responsibility for controlling and preventing air pollution at its source).

Second, for the reasons already set forth in Section II.A, *supra,* the APA precludes EPA's amending the 1982 regulations by summarily reinterpreting them to mean what EPA wants them to mean today. Simply put, EPA must conduct a rulemaking to amend the North and South Carolina rules. *See* 5 U.S.C. §551(5) ("rule making" is the process for amending a rule).

CONCLUSION

Because they were properly decided, this Court should affirm the decisions below.

September 15, 2006

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IN THE
Supreme Court of the United States

ENVIRONMENTAL DEFENSE, ET AL.,

Petitioners,

v.

DUKE ENERGY CORPORATION,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF OF WALTER C. BARBER AS *AMICUS CURIAE* SUPPORTING THE RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, Walter C. Barber, was the Director of the Office of Air Quality Planning and Standards ("OAQPS") at the Environmental Protection Agency ("EPA") from 1976 to early 1982.[2] In that capacity, he was in charge of staff involved in the development of the Clean Air Act regulations at issue in the present case, *i.e.*, the regulations governing pre-construction review and permitting of new and modified sources of air pollution, 45 Fed. Reg. 52,676 (August 7, 1980), commonly referred to as the 1980 "New Source Review" ("NSR") regulations.[3] While serving as Director of OAQPS, Mr. Barber also served as EPA's Acting Administrator from January to May 1981. During the time Mr. Barber was Director of OAQPS, Mr. Edward E. Reich, as Director of EPA's Division of Stationary Source Enforcement ("DSSE"), issued two applicability determinations regarding the NSR regulations that are at the heart of this case.[4] Due to his first-hand

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[1] All parties have consented to the filing of *amicus* briefs in letters that are on file with the Clerk. *Amicus*, Walter C. Barber, is receiving no payment of any kind in connection with this brief. Mr. Barber, however, served as a paid expert witness for Respondent Duke Energy Corporation in the trial court proceedings below with respect to issues other than those addressed in this brief. This brief was not authored in whole or in part by any attorney who is serving or has served in this case as counsel for a party.

[2] Mr. Barber has worked in the private sector since he left EPA. Since 2000, he has been a Group Vice President for Jacobs Engineering Group, Inc., with responsibility for its businesses in Asia and the Middle East.

[3] The term "New Source Review" is intended here to refer both to EPA's regulations for the Prevention of Significant Deterioration ("PSD") in so-called "clean air" areas and to the regulations governing pre-construction review in "nonattainment" areas.

[4] *See* Letter from Edward Reich, Director, Division of Stationary Source Enforcement, EPA, to Amasjit Gill, General Electric (June 24, 1981) (Jt. Appx. at 27-34); Memorandum from Edward Reich, Director,

knowledge of Mr. Reich's position within the Agency at that time, Mr. Barber is able to clarify the role that Mr. Reich and his office played in the development and implementation of the 1980 NSR regulations. Mr. Barber, in the interest of justice, respectfully wishes to assist the Court in gauging the significance of Mr. Reich's two determinations in 1981.

SUMMARY OF THE ARGUMENT

The various interpretations of the 1980 NSR regulations that Mr. Reich issued during 1981 in his capacity as Director of DSSE were authoritative. First, during the 1979-80 rulemaking and then during 1981, Mr. Reich was the top civil servant at EPA in charge of setting national policy for stationary source enforcement under the Clean Air Act. Second, Mr. Reich's office, DSSE, was the office within EPA that had primary responsibility and authority both for making applicability determinations under those regulations and for overseeing EPA's regional offices in following such determinations and referring requests for determinations. Finally, DSSE staff participated on the internal EPA working group that drafted the proposed and final versions of the 1980 NSR regulations.

ARGUMENT

In its Brief in Support of Petitioners, the United States characterized Mr. Reich as "a mid-level EPA official"[5] and his interpretations as "not authoritative."[6] Indeed, in its petition to the U.S. Court of Appeals for the

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Division of Stationary Source Enforcement, EPA, to Charles Whitmore, Chief, Technical Analysis Section, Region VII, EPA (Jan. 22, 1981) ("Cargill Memo") (Jt. Appx. at 35-37).

[5] Brief for the United States as Respondent Supporting Petitioners (July 21, 2006) at 13, 28.

[6] *Id.* at 14.

Fourth Circuit for rehearing in this case, the United States went so far as to describe Mr. Reich as "an inferior EPA official" during the relevant timeframe.[7] In a similar vein, some of the *amici curiae* supporting Petitioners in this case described Mr. Reich in their briefs as merely "a single EPA staff member"[8] and "a single agency employee."[9]

These characterizations by the United States and certain *amici* are factually incorrect and misleading, for the following reasons.

A. Mr. Reich Was Not an "Inferior" Official, But Instead at the Apex of EPA's Organizational Structure and in Charge of Clean Air Act Enforcement for the Nation's Entire Industrial Stock

First, it is critical to understand the organizational structure of EPA as it existed during the relevant period, 1979-81. Then, as now, the foremost authority to direct EPA's operations resided in the President and his appointees, especially the EPA Administrator, Deputy Administrator, and various Assistant Administrators. In 1979-81, the total number of such appointees was relatively small – fewer than 20. The next layer of management under those presidential appointees consisted of the top ranks of the career civil service, generally members of the Senior Executive Service ("SES"). Members of the SES also constituted a relatively small percentage of EPA's workforce. Beneath them were

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[7] United States' Petition for Panel Rehearing and Petition for Rehearing En Banc, *United States v. Duke Energy Corp.*, No. 04-1763 (M.D.N.C. July 29, 2005), at 13 n.6, excerpt attached as Appendix A.

[8] Brief of Former EPA Administrators Carol M. Browner and Russell E. Train as *Amici Curiae* in Support of Petitioners (July 21, 2006), at 19.

[9] Brief of the States of New York *et al.* as Amici Curiae in Support of the Petitioners (July 21, 2006), at 18.

multiple layers of middle managers, career civil servants, and other staff. During 1979-81, the total number of EPA employees nationwide was approximately 8,000-9,000. Thus, just below the thin layer of presidential appointees was a large number of civil servants supervised by a small cadre of SES-level professional managers.

Mr. Barber was the Director of OAQPS, with the responsibility for developing regulations to govern air pollution from stationary sources. He reported to the Assistant Administrator for the Office of Air & Radiation ("OAR"), a presidential appointee, who in turn reported directly to the EPA Administrator. Thus, Mr. Barber was only the second layer down from the Administrator in terms of setting national policy for stationary sources.

During the key period, 1979-81, Mr. Reich held a position that was comparable to Mr. Barber's, but it was in the parallel chain of command devoted to enforcement. That chain of command was known as the Office of Enforcement ("OE"). It had its own Assistant Administrator, who also reported directly to the Administrator. Thus, like Mr. Barber, Mr. Reich was only the second level down from the Administrator of EPA. Within OE, Mr. Reich was the Director for stationary source enforcement, responsible for communicating national policy on implementation and enforcement of the NSR program, and for ruling on NSR applicability determinations. Thus, Mr. Barber and Mr. Reich were peers who complemented each other functionally. Mr. Barber was responsible for leading the development of rules for air pollution from stationary sources, and Mr. Reich was responsible for leading the enforcement of those rules. Moreover, Messrs. Barber and Reich were the persons slated to provide continuity for the regulation of stationary sources as presidential administrations came and went.

From the standpoints of the Nation's environment and economy, the positions of Messrs. Barber and Reich were of critical importance and high prominence within the field of air quality management. The term "stationary sources" encompasses electric utilities, all manner of manufacturing plants, and the rest of the Nation's industrial capacity. The policies governing air pollution from such capital stock have profound implications for the health of citizens and the economy. Messrs. Barber and Reich were the top civil servants in charge of implementing those policies and, hence, uniquely positioned to have a significant impact on air quality and the economy.

In sum, Mr. Reich, along with Mr. Barber, were at the apex of the large body of civil servants at EPA who were responsible for controlling emissions from stationary sources. Below the thin layer of presidential appointees, no one in the field of stationary source enforcement had a position of greater authority, importance, and prominence than Mr. Reich. To say, as the United States does now, that he was merely a "mid-level" or "inferior" official, and that his interpretations were not authoritative, is simply wrong. Likewise, Mr. Reich was not just "a single agency employee," as certain *amici* would have it, but rather among the most senior of all the career employees in the chain of command devoted to stationary sources under the Clean Air Act.

B. During 1981 and Many Other Years, Mr. Reich's Office, DSSE, Had Lead Responsibility and Authority for the Making of Applicability Determinations for the 1980 NSR Regulations, and Was Active in Carrying Out That Responsibility

Implementation of the Clean Air Act for stationary sources has involved not only a hierarchy of officials at EPA's headquarters, but also officials in various sub-offices in each of EPA's ten regional offices (*e.g.*, offices that process "State Implementation Plans" or engage in enforcement activities) and in air pollution programs at the state, tribal, and territorial levels. Given the extensive variety of federal and non-federal offices involved, the vast number of stationary sources under regulation, and the diversity of source-specific circumstances, EPA from its inception has tried to ensure even-handed and consistent treatment of such sources, including such treatment under the NSR regulations.[10] One way EPA tried to do this during 1981 and surrounding years was to designate a single EPA Headquarters office as having the lead in issuing applicability determinations on behalf of Headquarters. For the 1980 NSR regulations, and for the relevant period (1979-81), that office was DSSE.

Typically, a stationary source or a state official would present an NSR applicability question to an EPA regional office. If the regional office could not answer the question confidently on the basis of the regulatory language or prior

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[10] Congress directed EPA to provide national uniformity and fairness in the criteria and policies applied by the various EPA regions in implementing and enforcing the Clean Air Act. See § 301(a)(2)(A) of the Act, 42 U.S.C. § 7601(a)(2)(A) (2006), and EPA's implementing "regional consistency" regulations at 40 C.F.R. §§ 56.1-56.7 (2006), *promulgated at* 45 Fed. Reg. 85,400 (Dec. 24, 1980).

determinations, then the regional office would refer the question to Mr. Reich's office. DSSE was understood within EPA and by state air pollution control officials to be the lead office for resolving applicability questions under the 1980 NSR regulations.[11] DSSE's determinations were binding on the regional offices and the states, subject only to reconsideration or appeal to the relevant presidential appointees.

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[11] The definitiveness of Mr. Reich's NSR guidance and interpretations around the 1981 time period is corroborated by contemporaneous documents and deposition testimony from two EPA career employees intimately involved in the NSR programs from their inception. In late 1983, for instance, Mr. Reich's office sent the appropriate directors in each of EPA's regional offices "a summary of all PSD determinations of applicability made by [his office] between May 1, 1983 and September 30, 1983," with instructions to "take note of the determinations and assure that affected agencies in your Region are aware of them as well." Mr. Reich commented that the summary would be his office's last, as the Comptroller's Office had "eliminated [his office's] applicability determination function." Memorandum from Edward Reich, Director, Stationary Source Compliance Division, EPA, to Directors, Air & Waste Management Divisions, EPA Regional Offices (1983), excerpt attached as Appendix B.

Michael Trutna, the chief of EPA's NSR section in the early 1980s, affirmed in deposition that, in mid-1983, Mr. Reich was "the ranking official that made [PSD] applicability determinations." Deposition of Michael Trutna, *United States v. Ohio Edison Co.*, Nos. C2-99-1181 and -1182, at 290 and 292 (S.D. Ohio Jan. 29, 2002), excerpts attached as Appendix C. Ronald Van Mersbergen, the regional NSR specialist for EPA Region V, also affirmed that Mr. Reich's office was the EPA office responsible for making applicability determinations in the early years of NSR. *See* Deposition of Ronald Van Mersbergen, *United States v. Ohio Edison Co.*, Nos. C2-99-1181 and -1182, at 203-06 (S.D. Ohio Oct. 7, 2002), excerpts attached as Appendix D. Mr. Van Mersbergen further affirmed that compilations of DSSE's applicability determinations would have been sent to, and binding upon, states with delegated authority to administer the PSD program on behalf of EPA. *See id.* at 207-12.

Under the organizational structure at the time, the enforcement function was separated from the air program rulemaking development function. The air program rulemaking responsibility was assigned to OAQPS, and the enforcement responsibility was assigned to DSSE. Responsibility for NSR applicability determinations was assigned to Mr. Reich's office. Mr. Reich and his DSSE staff could consult, and did consult, with OAQPS, the Office of General Counsel, and other relevant offices as they deemed necessary in making applicability determinations.[12]

DSSE performed the job of making applicability determinations for the 1980 NSR regulations frequently. Its staff, under Mr. Reich's direction, was in the business of making NSR determinations, both under the 1980 regulations, but also under the predecessor regulations.[13]

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[12] DSSE's 1981 applicability determination for Cargill, Inc. (*see* Jt. Appx. at 35-37), for example, states, "This determination has been made with the concurrence of the Office of Air Quality Planning and Standards and the Office of General Counsel."

[13] DSSE emphasized its role with respect to those predecessor regulations in a February 13, 1978 memorandum to EPA Region I, as follows:

> Further, it is the function of DSSE to provide guidance for interpretations which address the implementation of these regulations [*i.e.*, the NSR regulations for the Prevention of Significant Deterioration ("PSD") in effect at the time]. Reliance upon opinions obtained from other EPA offices without consulting DSSE will not ensure uniform national policy for implementation of these regulations. Agency policy requires that DSSE, after consulting with other EPA offices, make the final recommendation for interpretation of these requirements.

See Memorandum from Edward Reich, Director, Division of Stationary Source Enforcement, EPA, to Thomas W. Devine, Chief, Air Branch – Region I, EPA (Feb. 13, 1978) (Jt. Appx. at 477-483).

Winston Smith, who was chief of the Air Programs Branch of EPA's Region 4 office in Atlanta, Georgia in the late 1970s and early 1980s

During the six-year period from 1978 to 1983, DSSE made at least 94 NSR applicability determinations.[14] Plainly, DSSE had a substantial amount of experience handling NSR applicability determinations during the relevant period.

In sum, Mr. Reich was not just one air pollution manager at EPA among many managers all having some responsibility for implementing the 1980 NSR regulations. To the contrary, he was the manager who had the lead responsibility for making applicability determinations that were to govern the behavior of EPA regional offices and states in their implementation of those regulations. Moreover, he and his staff typically carried out that responsibility through consultation and the building of consensus as necessary, and they had a substantial amount of experience in issuing such applicability determinations. Against this background, it is incorrect to say that Mr. Reich's NSR determinations were not authoritative.

C. Mr. Reich's Office, DSSE, Participated Actively in the Rulemaking That Produced the 1980 NSR Regulations, Including the Drafting and Internal Review of the Proposed and Final Versions of Those Regulations

During Mr. Barber's tenure at EPA, the Agency used a working-group system for developing rules. For example,

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and is currently director of the waste management division there, affirmed in deposition that DSSE regularly sent guidance on PSD to all of the EPA regional offices, so as to share information with them and ensure the uniform interpretation and application of the rules. Deposition of Winston Smith, *United States v. E. Ky. Power Coop.*, No. 5:04-CV-0034-KSF, at 7-9 and 23-25 (E.D. Ky. Sept. 7, 2005), excerpts attached as Appendix E.

[14] These statistics are the result of searches in EPA's central web-based collection of NSR determinations, located at http://www.epa.gov/region7/programs/artd/air/policy/search.htm.

if EPA undertook a rulemaking, it would first form a working group made up of representatives of each office that had an institutional interest in the outcome. The group would prepare the necessary *Federal Register* notices and supporting analyses, and then push the notices up through the appropriate chains of command, and eventually to the Administrator, for signature. During the review and signature phase, each office director, such as Mr. Reich, would be asked to concur, concur with comments, or non-concur in the package of notices and analyses.

This system was used to develop the 1980 NSR regulations. The working group would have included representatives from OAQPS, DSSE, the Office of General Counsel, and certain other offices. During the rulemaking process from 1979-80, the group held frequent meetings to discuss specific issues. The representatives of particular offices were expected to contribute from the standpoint of the particular interests of their office. For instance, the DSSE representatives would have been expected to help and comment primarily with respect to enforcement policy. Moreover, the proposed and final rules would not have reached the Administrator's desk unless Mr. Reich had reviewed and commented on the *Federal Register* packages containing them.

Having participated in the rulemaking for the 1980 NSR regulations, the DSSE representatives on the working group would have gained an expert level of knowledge about the format and enforceability of the regulations, putting them in a good position to formulate authoritative interpretations of the regulations. Both the United States and the *amici* in question overlook this important reality when they suggest that Mr. Reich's office was just one ordinary office among several having some NSR responsibility.

CONCLUSION

Mr. Barber respectfully submits, based on his personal knowledge as Mr. Reich's peer during the formation of the 1980 NSR regulations, that Mr. Reich's applicability determinations and underlying interpretations of the 1980 NSR regulations were in fact authoritative, contrary to the suggestions of the United States and certain *amici*. Mr. Reich in 1981 was the top civil servant for stationary source enforcement under the Clean Air Act. The Agency had given him, as DSSE Director, the lead responsibility for making applicability determinations that were to govern implementation of the 1980 NSR regulations by EPA's regional offices and state, tribal and territorial agencies across the Nation. DSSE as an office and its director, Mr. Reich, had extensive experience making NSR applicability determinations. Finally, DSSE participated in the development of the 1980 NSR regulations.

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APPENDIX

A. Excerpts from United States' Petition for Panel Rehearing and Petition for Rehearing En Banc, *United States v. Duke Energy Corp.*, No. 04-1763 (M.D.N.C. July 29, 2005)

B. Memorandum from Edward Reich, Director, Stationary Source Compliance Division, EPA, to Directors, Air & Waste Management Divisions, EPA Regional Offices (1983)

C. Excerpts from Deposition of Michael Trutna, *United States v. Ohio Edison Co.*, Nos. C2-99-1181 and -1182 (S.D. Ohio Jan. 29, 2002)

D. Excerpts from Deposition of Ronald Van Mersbergen, *United States v. Ohio Edison Co.*, Nos. C2-99-1181 and -1182 (S.D. Ohio Oct. 7, 2002)

E. Excerpts from Deposition of Winston Smith, *United States v. E. Ky. Power Coop.*, No. 5:04-CV-0034-KSF (E.D. Ky. Sept. 7, 2005)

Appendix A

Excerpts from United States' Petition for Panel Rehearing and Petition for Rehearing En Banc, *United States v. Duke Energy Corp.*, No. 04-1763 (M.D.N.C. July 29, 2005):

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Nevertheless, the panel in a footnote concluded that the PSD regulations could be interpreted to adopt an hourly rate test as in NSPS. Slip op. at 15 n.7. The panel did not explain how its position could be reconciled with the regulatory text, though it noted that the district court had attempted to do so and described that court's reasoning.[6] Id. at 10, 15 n.7. That reasoning was, however, inconsistent with the regulatory language. The district court largely ignored the applicable part of the PSD regulations and reached its conclusion based on a misreading of an inapplicable part, known as the "increased hours" exclusion. 278 F. Supp. 2d at 640-41. Under that exclusion, "[a] physical change or change in the method of operation shall not include" an "increase in the hours of operation or in the production rate." 40 C.F.R. 51.166(b)(2), (iii) (1987). Based on a misunderstanding of that provision, the court thought the regulations could be read to say that an emissions increase traceable to increased hours of operations cannot trigger the PSD provisions. * * * *

---

[6] The panel also noted that "EPA's Director of the Division of Stationary Source Enforcement twice opined" that the PSD regulations could be interpreted to adopt an hourly rate test, slip op. at 16 n.7, but the documents in question – two letters written by an inferior EPA official in 1981 – contained no analysis of the regulatory language and in fact were inconsistent with that language. App. 234-35, 242-43.

Appendix B

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
AIR, NOISE, AND RADIATION

MEMORANDUM

SUBJECT: Applicability Determination Summaries

FROM: Director
Stationary Source Compliance Division
Office of Air Quality Planning and Standards

TO: Directors, Air & Waste Management Divisions
Regions II-IV, VI-VIII, X

Directors, Air Management Divisions
Regions I, V, IX

Attached is a summary of all PSD determinations of applicability made by this office between May 1, 1983 and September 30, 1983. Please take note of the determinations and assure that affected agencies in your Region are aware of them as well.

You should also be aware that, as explained in my September 15, 1983 memorandum, budget cuts directed by the Comptroller's Office have eliminated SSCD's applicability determination function. Thus, this will constitute our final summary of applicability determinations.

s/

Edward E. Reich

Attachment

cc: Peter Wyckoff
Sara Schneeberg
Mike Trutna
PSD Contacts

Appendix C

Excerpts from Deposition of Michael Trutna, *United States v. Ohio Edison Co.*, Nos. C2-99-1181 and -1182 (S.D. Ohio Jan. 29, 2002):

[page 289]

* * * *

BY MR. BRUBAKER:

Q. Mr. Trutna, I hand you what's been marked as Exhibit OE 194. Have you seen this document before, Mr. Trutna?

A. Not to my recollection.

Q. Are you familiar with a coal conversion

[page 290]

project that occurred at the Bridgeport Harbor Unit 3 generating unit in Bridgeport, Connecticut, during your tenure as chief of the new source review section?

A. I'm looking. I see I'm a cc, so I probably got a copy of this document. I cannot recall any involvement in it immediately, anyway.

Q. You may or may not have had involvement, you just don't recall presently?

A. I certainly don't recall presently. There's a chance reading this might refresh my memory.

Q. Okay. And you see it's signed by Edward Reich?

A. Yes.

Q. And he is the top air enforcement person who was making PSD applicability determinations at this time; is that right?
A. I believe he was the ranking official that made applicability determinations, yes.
* * * *

[page 292]

Q. And this determination bears a date of July 28, 1983. That would be a determination, then, made under the 1980 PSD rules, would it not?
A. And, apparently, the NSPS rules as well.
Q. And this was a determination made at the time you were chief of the new source review section?
A. Yes. * * * *

Appendix D

Excerpts from Deposition of Ronald Van Mersbergen, *United States v. Ohio Edison Co.*, Nos. C2-99-1181 and -1182 (S.D. Ohio Oct. 7, 2002):

[page 203]

* * * *

Q. Mr. Van Mersbergen, I'd like to show you OE 553. This is a memorandum from February 13, 1978, from a Mr. Ed Reich. Do you recognize the name Ed Reich?
A. I do.

[page 204]

* * * *

Q. Do you know the position Ed Reich had in the EPA in 1978?
A. Okay. According to this memo, at that time he was director of the stationary source enforcement division.
Q. The division of stationary source enforcement in Washington?
A. That's correct.
Q. And you understand that to be the headquarters enforcement office?
A. Yes.
Q. I think it might have gone through some slight name changes from time to time, but there was a headquarters enforcement office that Ed Reich was the leader of?
A. That's correct. * * * *

[page 205]

* * * *

Q. Do you recall the headquarters enforcement office taking primacy with respect to all PSD applicability determinations in this time frame?

A. Yes. They made the applicability

[page 206]

determinations in the earlier years.

Q. So it was centralized in Washington within the enforcement group in Washington; is that right?

A. That's correct.

Q. Did they keep records of the PSD applicability determinations they made –

MR. MACLAUGHLIN: Objection.

Q. – the headquarters enforcement office that is?

MR. MACLAUGHLIN: Objection; foundation; speculation.

You may answer.

A. I am aware of determinations that they have cataloged and sent out, but I am in no position to say whether or not everything they did they kept record of.

Q. Uh-huh.

A. So I – the answer is I don't know whether they kept record.

Q. But you are aware of a catalog that was kept by the headquarters enforcement office of PSD applicability determinations?

A. That's correct.

[page 207]

Q. And did you receive that catalog in the course of your work as the NSR person in Region 5?
A. I did.

- - - - -

Thereupon, OE Exhibit 554 is marked for purposes of identification.

- - - - -

Q. Let me ask you to look at OE 554, Mr. Van Mersbergen. This is a January 9, 1980 memo from Ed Reich to a number of addressees that attaches a summary of applicability determinations prepared by his office and then there appears an organized numbering system of determinations. Do you recognize this as the kind of compilation of PSD applicability determinations you received in this 1980 time frame?

MR. MACLAUGHLIN: Objection; foundation.

You may answer.

A. I recognize these determinations having received – having received these kinds of determinations for applicability determinations they made in Washington.

[page 208]

* * * *

Q. Now, would these PSD applicability determinations from Mr. Reich qualify as determinations or guidance within the meaning of this Paragraph 3 of the Ohio EPA PSD delegation letter?

A. Certainly, within the scope of the PSD regulations that were at that time – that were at that time. There was a regulation change in 1980, and it might not be certain that after the delegation that all these particular pieces of – all these policy statements were applicable to another set of regulations that was substantially different than the earlier set.
Q. Do you know if the headquarters enforcement office continued in its centralized function of making PSD applicability

[page 209]

determinations after 1980?
A. There was sometime when that program pulled back and the responsibilities shifted – the lead – there was a time when those responsibilities begin to emerge into the office of general counsel shared with enforcement and OAQPS. There's some time there it was sort of worked out that this group would be now making these determinations or – and then they would divide up that which would be technical, that which would be essentially legal.
Q. So the centralized monopoly, if you will, of the headquarters enforcement office to make these determinations was disseminated among several different offices within EPA at some point in time?
A. It was disseminated and then as regions matured, some of these determinations were then further delegated to the regions with the intent to incorporate input from the headquarters office.
Q. Do you recall when the transition from

centralized determinations to decentralized or more decentralized determinations in the NSR program occurred?

[page 210]

A. It wasn't –

MR. MACLAUGHLIN: Objection; ambiguous. You may answer.

A. Yeah, right. It wasn't a specific date. It was – it was a fluid thing. And as I said, there was some regions that had more competence; and then there were some regions that even with competence felt pretty dependent on headquarters. And then there were some regions that loved the – what they considered autonomy. So it was a mixed bag. So I can't say what time. It just occurred gradually. And to an extent, all right? Even upon the time I left, we felt pretty dependent upon getting headquarters' input if nothing more than to make sure that we had national consistency.

* * * *

[page 211]

* * * *

Q. Mr. Van Mersbergen, I've shown you OE 555. This is a set of documents that's been produced in discovery by the United States in this case, and it appears to be an update of the compilation in this case of NSPS applicability determinations from the headquarters enforcement office. If I could just call your attention to the page that has the Bates stamp 2285 on it.

That's about ten pages into this document. It's a February 4, 1983 memo from Ed Reich.
A. Okay, yes. Yes, okay.
Q. And this is the same Ed Reich who is the head of headquarters enforcement, is it not?

[page 212]

A. Yes, it is.
Q. And then you'll see behind that letter is an organized numbered system of NSPS applicability determinations?
A. Let me see if I can identify that as NSPS. I don't see anything specifying that.
Q. Go back to the page we were just looking at, the memo from Mr. Reich.
A. Yes.
Q. It's a composite summary of all NSPS determinations of applicability made by Mr. Reich's office through December 31, 1982.
A. Okay. I concur that your observation is correct.
Q. Are these the kind of determinations that you in your job in Region 5 would receive a copy of and use in your job?
A. That's right. This was one of the series, and we would distribute these to the states. * * * *

Appendix E

Excerpts from Deposition of Winston Smith, *United States v. E. Ky. Power Coop.*, No. 5:04-CV-0034-KSF (E.D. Ky. Sept. 7, 2005):

[page 6]

* * * *

Q. You're currently with the Environmental Protection Agency; is that correct?
A. Yes, I am.
Q. What is your current position?
A. I'm director of the waste management division in EPA Region 4's regional office here in Atlanta, Georgia.
* * * *

[page 7]

* * * *

Q. And am I correct that you began with Region 4 EPA here in Atlanta sometime in 1974?
A. Yes.
Q. And from 1974 until that date you gave, 2002, were you in the air program in Region 4 the entire time?
A. Different parts of it, yes.
* * * *

[page 8]

* * * *

Q. Can you approximate when it was that you became branch chief?
A. Well, the date can be determined precisely. I think it was around the end of 1978.
Q. And of what branch did you become chief at that time?
A. It was called either the air programs or air planning branch.
Q. Did you hold that position until you became division director in 1985?
A. No.
Q. What jobs or positions did you have in the interim?
A. There was a reorganization of the region, and I don't remember the date, and all of the air

[page 9]

branches were consolidated into a branch, and I was the deputy branch chief.
A. And you don't recall the approximate year that that occurred?
A. Early '80s. No, I don't recall the approximate year, the exact year, I mean.
* * * *

[page 23]

* * * *

Q. (By Mr. Long) Mr. Smith, do you recognize what Exhibit 230 represents?

A. Yes.
Q. What is it, sir?
A. It's a memorandum talking about commencing construction under PSD.
Q. Is this an example of guidance that the regions would get on the air programs which you referred to earlier?
A. Yes.

[page 24]

Q. Is it from the director of the division of stationary source enforcement; do you see that?
A. Yes.
Q. And it was sent, I take it, to all the regions; is that correct?
A. I can't confirm that. Certainly sent to Region 4. The CC lists a lot of names. I can't confirm that was the current list of division directors at that time or they were in all the regions.
Q. Was it part of the regular operating procedures at that time for guidance to be circulated to all the regions?
A. Yes.
Q. And the purpose of that was to ensure the uniform interpretation and application of the rules; is that correct?
A. One of the purposes, yes.
Q. Okay. Other purposes you can think of?
A. Information sharing.
Q. What was the division of stationary source enforcement at the time, to your understanding?
A. The division of stationary source enforcement was a division in headquarters. And

headquarters normally develops the guidance and

[page 25]

implementation procedures for these programs, and this part of PSD was their responsibility.
Q. When you say, this part of PSD was their responsibility, what exactly do you mean?
A. I'm not sure I can define that exactly. There are other divisions in office of air quality plannings and standards in North Carolina that had responsibility like modeling and things like that, but certain – certain decisions were made by certain divisions in terms of implementation, guidance. And commence construction was under obviously what we refer to as DSSE. * * * *

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(23)

No. 05-848

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IN THE

Supreme Court of the United States

ENVIRONMENTAL DEFENSE, ET AL.,
Petitioners,

v.

DUKE ENERGY CORP., ET AL.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF *AMICI CURIAE* U.S. REPRESENTATIVE JOE L. BARTON IN SUPPORT OF THE RESPONDENTS

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123 Cong. Rec. 18,019 (1977)	12
123 Cong. Rec. 18,021 (1977)	20
123 Cong. Rec. 18,040 (1977)	21
123 Cong. Rec. 18,022 (1977)	22
Environmental Policy Division (1978), Library of Congress, 95th Cong., 2nd Sess., A Legislative History of the Clean Air Act Amendments of 1977: a Continuation of the Clean Air Act Amendments of 1970 (1978), Washington, DC: US Senate Committee on Environment and Public Works Print	12
H.R. Rep. No. 91-1146 (1970)	8, 20
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IN THE

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No. 05-848

ENVIRONMENTAL DEFENSE, ET AL.,
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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* U.S. REPRESENTATIVE JOE L. BARTON IN SUPPORT OF THE RESPONDENTS

STATEMENT OF *AMICUS CURAE* IDENTITY AND INTEREST[1]

Current and former Members of Congress Waxman, Markey, Rooney, Maguire, Ottinger, Moffett, and Anderson ("Waxman, *et al.* Amici") have filed *amicus curiae* brief in this case. U.S. Representative Joe L. Barton files this amicus brief in response as well as to correct inaccurate representations by Petitioners of Congress' intent. Representative

[1] Pursuant to Supreme Court Rules 37.3 and 37.6, the undersigned represents that (1) all parties consented to the filing of this brief; (2) no counsel for any party authored this brief either in whole or in part; and (3) no person or entity other than the above-named *amici* curiae and their counsel made any monetary contribution to its preparation or submission.

Barton participated in the lengthy legislative debates and discussions that led to the 1990 amendments to the Clean Air Act ("CAA" or the "Act") and, as Chairman of the House Committee on Energy and Commerce with oversight responsibility over the CAA, has a unique interest in ensuring that the Act is properly construed and implemented.

INTRODUCTION

Chairman Barton respectfully requests that this Court take note that the conclusion advanced by Petitioners and Amici Waxman, *et al.* (hereinafter, "Petitioners") in *Environmental Defense, et al., v. Duke Energy Corp., et al.*—that the Act's New Source Review program was intended to serve as an omnibus pollution control regime ultimately applicable to all existing sources electing to continue in operation—is wrong for several particular and compelling reasons made quite clear by the Act's history, language and implementation.

First, Congress never intended New Source Review as even a principal vehicle for achieving pollution control from existing sources. Had Congress intended such an outcome it would have said so, as revealed by the Act's very deliberate construction. Instead, Congress intentionally created a regulatory regime where existing sources of pollution were principally regulated by the individual states. Moreover, as the program's name implies, Congress intended New Source Review to address new sources of otherwise unregulated pollution—that is, newly constructed sources or those that undergo "modification" expanding their capacity to emit.

The Act's history is replete with clear illustrations that the counterintuitive reading advanced by Petitioners was not in fact Congress' intent. Unavoidable among these is that the radical policy shift Petitioners advocate would also make numerous, significant Clean Air Act regulatory programs superfluous. Further, Congress expressly addressed and re-

jected Petitioners' suggested policy both in the 1977 and 1990 CAA amendments.

Specifically, therefore, the Fourth Circuit accurately determined that EPA's 1980 "modification" rule must be consistent with Congress' view that neither the New Source Review program ("NSR") nor the New Source Performance Standards Program ("NSPS") (hereinafter, "New Source Programs") were intended to be the primary regulatory mechanism for reducing pollution from existing sources.

SUMMARY OF THE ARGUMENT

Statutory language and history make clear that in enacting and amending the Clean Air Act, Congress rejected the concept of demanding universal, immediate and across-the-board pollution reductions through the mandatory retrofit of new source pollution control technologies. Instead, from the Act's inception, to achieve its goal of reducing air pollution to protect public health with an adequate margin of safety Congress adopted a system of pollutant-specific National Ambient Air Quality Standards ("NAAQS"), subject to periodic review and revision by EPA consistent with the latest available scientific and technical data. Each area throughout the United States was required to meet the NAAQS, with primary responsibility for NAAQS compliance and maintenance expressly with the States.

Contrary to Petitioners' arguments, NSR was not intended to confront utilities or any other major stationary sources with an option of either shutting down or retrofitting new advanced pollution controls within a specified period of time. Unlike other CAA control regimes, Congress did not intend the New Source Programs to reduce emissions from existing sources operating in accordance with their original design capacity; pollution from existing sources is already fully accounted for by the relevant air quality plans. Instead, New Source Programs were to control new emissions growth, that

is, newly constructed facilities or existing facilities undergoing construction to expand their capacity to emit ("modification"). Emissions from existing facilities not so "modified" remain within the discretion and purview of the individual States to devise and implement actions to attain the NAAQS, subject to EPA approval, as provided in the 1970 and 1977 CAA Amendments.

Neither the Act's statutory language nor legislative history indicate any intention by Congress that New Source Programs be triggered by activities that accomplish nothing more than enabling a facility to operate as constructed and within permitted limits. Nor do New Source Programs otherwise disrupt Congress' deliberately constructed hierarchy of Clean Air Act regulatory programs for obtaining emission reductions from existing sources, with NSR created to respond to activities adding new pollution for which States had not previously accounted in their role as primary regulatory authority over existing facility emissions.

Construing the term "modification" to include "the most mundane activities" at existing sources, *irrespective of whether they actually create new pollution*, requires believing that Congress intended to make redundant and/or obsolete other regulatory programs it went to great effort and detail to enact, and that Congress intended to drive the entire emission inventory attributable to the operations of major stationary sources down to the lowest, technologically feasible levels within a relatively short window of time. The structure and entire legislative history of the Act defy this conclusion.

Petitioners' view of NSR begs the question why Congress bothered to enact the highly complex CAA programs, such as the landmark Title IV acid rain provisions and elaborate Title I reasonable further progress ("RFP") provisions designed to independently achieve NAAQS attainment, which Petitioners would make redundant and unnecessary. This outcome defies credulity and all available evidence, seeking to institute

"regulation by litigation instead of by notice and comment rulemaking." *See United States v. Alabama Power Co.*, (N.D. Ala.; Case No. 2:01-cv-00152-VEH (Memorandum Opinion, Aug. 14, 2006)).

Congress developed an extensive hearing record, in the years-long debate over the 1990 Amendments, to assess the sufficiency of extant programs including NSR and NSPS to attain the large additional reductions in key air pollutants necessary to address acid rain. Congress concluded and plainly articulated that NSR was neither capable of securing nor designed to secure emission reductions from existing sources.

Construing the NSR provisions established by the CAA Amendments of 1977 as Petitioners request would therefore ignore this history and also strip the subsequently enacted 1990 Amendments of any discernible meaning. It is axiomatic that such a construction defies congressional intent, specifically as reflected in at least the major 1977 and 1990 CAA revisions. This Court should therefore reject Petitioners' construction of the Act and the 1980 NSR regulations.

ARGUMENT

I. CONGRESS DID NOT INTEND THE NSR PROGRAM TO THREATEN ALL EXISTING FACILITIES WITH A "SUBMIT OR SHUT DOWN" ULTIMATUM UPON EXPIRATION OF SOME UNWRITTEN "GRACE PERIOD" OR "GRANDFATHERING."

A. The Clean Air Act's Deliberate Scheme.

Congress deliberately titled its "New Source" Programs as such because these Programs were intended to cover new facilities, that is, new and otherwise unregulated *capacity* to pollute, or "new sources." These include existing sources that are "modified" to create new pollution not yet regulated

under the CAA programs applying to existing sources of pollution, thereby protecting public health and welfare. The Act's evolution clearly and obviously reveals this scheme.

While Congress, through its 1970 Clean Air Act amendments, introduced a federal requirement for States to comply with the National Ambient Air Quality Standards ("NAAQS"), *see* 42 U.S.C. § 7409, Congress also reserved "primary responsibility" for the States to attain and maintain NAAQS, *see* 42 U.S.C. § 7401(a)(3); *see also Union Elec. Co. v. EPA*, 427 U.S. 246, 269 (1976) (emphasizing that Clean Air Act section 110 left to the States "the power to determine which sources would be burdened by regulations and to what extent"). This hierarchy reflects Congress' considered judgment that State governments better understand local needs and circumstances and are thus best able to craft appropriately tailored programs to improve air quality. *See, e.g., Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 470-71 (2001); *id.* at 493 (Breyer, J., concurring in part and concurring in the judgment); *General Motors Corp. v. United States*, 496 U.S. 530, 532-33 (1990).

This same conclusion—that States are better suited to determine local conditions, needs and solutions—informed Congress' decision to leave to the States with discretion over what specific retrofit measures were needed to attain the NAAQS. Thus, each State's individual State Implementation Plan or "SIP" articulates how best to achieve the Clean Air Act's air quality goals through emission reductions and controls from sources within each State's border. *See* 42 U.S.C. § 7410. In that SIP, the State calculates an attainment-level "emissions budget," comparing it with the existing and projected base-line "business as usual" emissions level. The State is thus able to determine the required aggregate emission reductions, and to assign detailed emissions limitations to existing sources to achieve this required quantity of reductions.

It is noteworthy that Congress did assert federal primacy for regulating particular categories of pollution. These national programs generally focus on sources that individual States are unable to control such as automobiles and other mobile source standards. This reinforces State primacy over pollution sources they can control such as large stationary sources. The interpretation of the NSR program that Petitioners advance, by contrast, both subverts the State's regulatory primacy in this area and significantly revises the CAA's scheme by abandoning the concept of State discretion over how to regulate existing sources to attain the NAAQS.

Finally, it is important to note that existing facility emissions from sources operating as constructed and permitted to operate and not installing or creating new capacity ensure attainment, and are, therefore, by definition not "increas[ing] pollution." In establishing individual source emissions limits, States assume the *maximum potential* emissions from each existing source—based on around-the-clock operations, unless otherwise limited by an enforceable permit term. A State must demonstrate that with the controls implemented for each source it will attain the standard for the relevant criteria pollutant by the required attainment date, even with all sources operating at maximum capacity. As a result, the relevant SIP already takes into account all the existing air pollution capacity in a way designed to attain and maintain the NAAQS. There is, therefore, no new pollution capacity created by a source that repairs a broken or failing component so that the source can continue to operate as it was constructed and permitted by the State to operate, and then continues to operate in subsequent years in accordance with the SIP and its Clean Air Act permits.

B. Controlling New and Existing Sources.

NSR has always been focused on regulating new capacity to pollute, that is, on managing new growth. It was never

about obtaining additional reductions from existing facilities as Petitioners advance. Such a result would blur and indeed obviate Congress' clearly drawn lines. What Petitioners actually seek is judicial implementation of a 1997 internal enforcement policy memo to impose this radical policy change[2]—eviscerating major programs specifically designed to regulate precisely those sources.

1. *Addressing New Sources.*

Although State-level SIP actions are the principal Clean Air Act mechanism to achieve NAAQS compliance, Congress also envisioned several CAA regulatory measures directed exclusively at new sources. Congressional considerations in adopting those new source provisions included avoiding industrial relocation, or "forum shopping," which Congress addressed by calling upon new sources to install advanced pollution controls, irrespective of the local air quality needs, again while reserving primacy over existing sources to the States. H.R. Rep. No. 91-1146, at 3 (1970). Despite this and select other new source-specific regulatory programs, Congress was clear that the NSPS was a narrow departure from the overall State primacy in abating air pollution.

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[2] See, *e.g.*, "[A] 1997 enforcement memorandum leaked to the media . . . shows EPA's desire to force additional reductions in emissions by arbitrarily revising enforcement practices instead of the more appropriate regulatory process complete with its public comment and review requirements. In 1998, the EPA changed enforcement practices when they renounced the 1992 NSR interpretation in a proposed rule calling parts of the WEPCO decision a departure from Agency policy which should not be continued. . . . Finally, in 1999, the EPA filed NSR lawsuits against seven electric utility companies and an administrative enforcement order against the Tennessee Valley Authority, alleging NSR modification violations at 24 different facilities, reaching back as many as 22 years." Sen. George Voinovich, Chairman, Senate Subcommittee on Clean Air, Climate Change and Nuclear, "*The Clean Air Act's New Source Review Program: A Policy in Desperate Need of Reform,*" found at http://voinovich.senate.gov/policy_paper/nsr_whitepaper.pdf.

Numerous Members of Congress instrumental in the 1970 CAA amendments elaborated on this State/federal hierarchy in the CAA, including Representative Harley O. Staggers[3] and Representative William L. Springer.[4]

In 1974, EPA created the NSR program, by regulatory fiat.[5] Congress codified this program in 1977, incorporating in the process the NSPS definition of "modification." *See, e.g.*, 42 U.S.C. § 7501(4) ("The terms 'modifications' and 'modified' mean the same as the term 'modification' *as used in* section 7411(a)(4) of this title [the NSPS program].") (emphasis added).

As with other CAA decisions described herein, this was a deliberate act. By incorporating the NSPS modification definition into the NSR program, Congress ensured that

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[3] "The enforcement of air pollution regulations is partly the responsibility of the States and partly that of the Federal Government. The [1970 amendment] provides that the Federal Government shall have primary responsibility for the enforcement of performance standards for new stationary sources and hazardous emissions from stationary sources. The States on the other hand will have primary responsibility for the enforcement of State plans and the emission limitations provided for in those plans with regard to existing stationary sources." 116 Cong. Rec. 42, 520 (1970).

[4] Springer noted during the floor debates that NSPS was a "departure" from the ordinary division of responsibility, but that the departure was "sensible" because "[s]topping these extraordinary problems before they develop is best for the antipollution effort and it is also best for those who would build such installations and then find they could not operate." 116 Cong. Rec. 19,206 (1970).

[5] EPA established the Prevention of Significant Deterioration ("PSD") component in 1974 for sources located in attainment areas, *see* Approval and Promulgation of Implementation Plans: Prevention of Significant Air Quality Deterioration, 39 Fed. Reg. 42,510 (Dec. 5, 1974), and the non-attainment sources were subjected to NSR through a 1976 EPA rule, *see* Requirements for Preparation, Adaption [sic], and Submittal of Implementation Plans: Air Quality Standards; Interpretive Ruling, 41 Fed. Reg. 55,524 (Dec. 21, 1976).

existing sources traditionally addressed at the State level became subject to federal requirements to install new pollution control equipment only when projects at these sources increased their capacity to emit pollutants—which is the clear threshold for becoming a "new source" of pollution.

It was for these reasons that Congress never described NSR as a program to decrease emissions from existing sources. Despite its current litigation posture, EPA agrees—recently declaring that to interpret the Clean Air Act to "ensure that all major facilities eventually trigger NSR cannot be squared with the plain language of the Clean Air Act." Prevention of Significant Deterioration (PSD) and Non Attainment New Source Review (NSR): Equipment Replacement Provision of the Routine Maintenance, Repair and Replacement Exclusion, 68 Fed. Reg. 61,248, 61,273 (Oct. 27, 2003).

Similarly, EPA also acknowledges Congress' view that SIPs, not NSR programs, were the primary vehicle for obtaining emissions reductions: "Rather than NSR, the Act's primary mechanisms for achieving the emission reductions needed to attain or maintain NAAQS are State Implementation Plans." Brief of the Envtl. Prot. Agency 75, *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005).

2. *Controlling Existing Sources.*

Beginning in 1970, Congress also emphasized the distinction between its approaches to regulating new and existing sources by repeatedly considering and rejecting schemes to impose on existing sources the mandatory control technology required of new sources. For example, in 1970, Congress considered and rejected imposing NSPS requirements on existing emissions sources covered by the SIP limits. *See* S. Rep. No. 91-1196, at 15-16 (1970).

Then, during debate over the 1977 Clean Air Act Amendments Congress again specifically rejected attempts to impose

universal retrofitting of all existing major stationary sources. *See* H.R. Rep. No. 95-294, at 185 (1977):

> Building control technology into new plants at time of construction will plainly be less costly than requiring retrofit when pollution ceilings are reached. For example, testimony from the electric utility industry indicates that it costs about 25 percent less to purchase and install flue gas desulfurization technology on a new plant than it would cost to retrofit that plant subsequently.

Congress' reasoning is inescapable: requiring NSR and the installation of advanced pollution controls would be prohibitively expensive for existing sources. Congress therefore rejected using the blanket approach of across-the-board, technology-forcing regulation for existing sources, favoring instead narrowly tailored, State-administered schemes to achieve emission reductions from existing sources. *See, e.g.*, 42 U.S.C. §§ 7491(b)(2)(A) (providing for "best available retrofit technology" for a limited class of existing facilities), 7502(c) (providing for "reasonably available control technology" ("RACT") for certain existing facilities in non-attainment areas). In this regard, the mandatory RACT requirement was limited to helping provide for the aforementioned "reasonable further progress" ("RFP") to ensure "attainment of the applicable [NAAQS] by the applicable date." 42 U.S.C. § 7501(1).

Congress certainly would have seen such a detailed scheme for existing sources as unnecessary if it had already required, as Petitioners suggest, that NSR mandate eventual universal retrofitting of advanced pollution controls on all existing facilities.[6] Indeed, further betraying this interpretation is that

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[6] As explained in both the utility and industry *amici* briefs, the types of projects that Petitioners contend trigger NSR are similar to projects undertaken every year across industry by every industrial facility merely to maintain the ability to operate as constructed and permitted to operate.

universal application of new source control technology contradicts Congress' express belief that such retrofitting would be unnecessary because of other targeted, existing source-level controls. As made clear by the principal architect of the 1977 Clean Air Act Amendments, Senator Edmund Muskie: "It is [Congress'] intent that 'reasonable further progress' means pollution control will reduce emissions at a rate that will lead to attainment of the ambient standards in the time required." 123 Cong. Rec. 18,019 (1977); Environmental Policy Division (1978), Library of Congress, 95th Cong., 2nd Sess., A Legislative History of the Clean Air Act Amendments of 1977: a Continuation of the Clean Air Act Amendments of 1970 (1978), Washington, DC: US Senate Committee on Environment and Public Works Print. Accordingly, the RFP requirements, including RACT-level controls, were intended to attain the NAAQS without additional reductions secured through the non-attainment NSR program.

This pattern continued during the 1980s when Congress repeatedly considered and rejected legislative proposals to impose, on existing coal-fired boilers, the choice between retrofitting with new source control technologies and shutting down. *See* S.321, 100th Cong. (1987); S.316, 100th Cong. (1987); S.300, 100th Cong. (1987); S.2813, 99th Cong. (1986); S.2203, 99th Cong. (1986); S.2200, 99th Cong. (1986); H.R.4567, 99th Cong. (1986); S.52, 99th Cong. (1985); H.R.5555, 97th Cong. (1982). That Congress bothered considering these sector-specific bills reveals its understanding that all existing facilities do not ultimately trigger NSR. Rejecting the proposals only affirms Congress' intent that ultimate NSR coverage of all industrial facilities

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If one accepts at face value the complaints filed by citizen groups and the Government in the NSR enforcement initiative, every individual industrial facility in this country has routinely triggered NSR preconstruction permitting under the NSR program year after year since 1980.

could not be the case. The present EPA NSR enforcement initiative implausibly assumes that the entire electric utility industry, refining industry, and much of the American Industrial sector were for decades all in massive non-compliance with existing regulatory requirements. That Congress engaged in the major 1977 and 1990 rewrites of the Clean Air Act without taking notice of such an anomaly, were it real, only further exposes the unsupportable nature of EPA's litigation position.

In sum, the history of the Clean Air Act prior to its 1990 Amendments manifests serial congressional rejection of Petitioners' preferred "retrofit or shut down" mandate to control emissions from existing sources. Instead, Congress left decisions regarding existing-source pollution primarily to the States and reserved authority to EPA only in limited areas consistent with the statutory hierarchy, explicitly avoiding the massive economic disruption that would follow from a heavy-handed, top-down approach to controlling pollution from existing sources.[7]

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[7] In fact, EPA had the same understanding when it included the reconstruction provision in the NSPS rules. Reconstruction is an exception to the requirement that an emissions increase triggers NSPS for an existing unit. When an existing unit expends 50% or more of the cost of a comparable entirely new facility, then that expenditure triggers application of NSPS. This is because EPA, like Congress, understood new source controls rarely apply to existing sources, and thus only required retrofitting new source controls when creating new and unregulated pollution or spending so much on an old facility that it becomes in essence a new facility. 40 Fed. Reg. 58,416 (Dec. 16, 1975) (final rule); 39 Fed. Reg. 36,946 (Oct. 15, 1974) (proposed rule), *id.* at 36,948 ("The purpose of this proposed [reconstruction] provision is to discourage the perpetuation of a facility, instead of replacing it at the end of its useful life with a newly constructed facility.").

3. *NSR was deliberately designed to address growth.*

Though it repeatedly confirmed that mandatory new source pollution control retrofits from existing sources was not the law, Congress did stake out a deliberate role in the overall Clean Air Act scheme for EPA's regulatory PSD and NNSR programs. The 1977 Clean Air Act Amendments established a PSD "increment" program managing growth in areas meeting air quality standards to ensure that air quality did not significantly deteriorate. *See* 42 U.S.C. § 7470 (PSD program is intended "to protect health and public welfare from any actual or potential adverse effects . . . notwithstanding attainment," while ensuring that economic growth "will occur in a manner consistent with the preservation of existing clean air resources.") As EPA recently explained, "the NSR program is a growth measure and is not specifically designed to produce emission reductions. Instead, its purpose is to allow new source growth to occur without interfering with an area's ability to attain." Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard, 69 Fed. Reg. 23,951, 23,986 (Apr. 30, 2004).

NSR's focus on new emissions growth, and not on increased utilization of existing permitted emissions capacity, reflects Congress' balancing of economic and environmental concerns. The Clean Air Act repeatedly took care to note its goal, in addition to protecting and improving the nation's air quality, of regulating in a fashion that is protective of the American economy. 42 U.S.C. § 7401(b)(1). The purpose of the 1977 Amendments, which included the NSR provisions, was to "insure the protection of the public health and the environment . . . while at the same time considering the energy and economic needs of this Nation." H.R. Rep. No. 95-294, at 34-35 (1977). With respect to the PSD program itself, Congress declared that the occurrence of economic growth is among the purposes of the PSD provisions in the

Clean Air Act. 42 U.S.C. § 7470(3). Petitioners ignore these express considerations by predicating mandatory retrofit of new source control technology on the act of performing maintenance on existing productive capacity. Thus, while Petitioners cite the Act's purpose in their attempt to support the need to interpret "modification" differently in NSPS and PSD, they conveniently avoid citing, and ignore invoking the entirety of, the Act's stated purpose.

4. *In the 1990 CAA Amendments, Congress reaffirmed previous regulatory choices, and strengthened controls on existing sources, without altering NSR's role in the hierarchy.*

The 1990 Clean Air Act Amendments further affirm that NSR does not mandate all existing units eventually to retrofit mandatory new source control technology, and that NSR does not apply when existing power plants undertake activities not changing their original design capacity, even if those activities extend the source's productive life.

A major objective of the 1990 Clean Air Act Amendments was to mitigate potential environmental damage from acid rain. The major pollutants implicated in acid rain are sulfur dioxide ("SO_2") and nitrogen oxides ("NO_x"). Consequently, Congress required massive reductions in SO_2 and NO_x emissions. When considering potential control tools, Congress understood that electric utilities were never subject to the NSPS or NSR programs were undergoing refurbishment and life extension work, that they would be operated without new source pollution controls beyond 2010, and that their longer operating lives and increased utilization would cause a steady rise in national emissions in compliance with extant Clean Air Act permits and regulations. *See* 42 U.S.C. §§ 7651(a)(28)-(29), 7651(b).

Congress nonetheless elected against requiring each existing power plant to retrofit new source pollution control

equipment, favoring instead a national cap-and-trade regime designed to reduce SO_2 emissions much more efficiently and at much lower cost than by mandating uniform technology. Congress also achieved a reduction in NO_x emissions of approximately two million tons under Title IV, and addressed the long-range transport of NO_x. 42 U.S.C. § 7651(b). These provisions, not NSR, were designed to generate massive reductions in air pollution from existing sources. Unlike applying NSR to existing facilities, the Title IV acid rain program did so with economic efficiency, and deliberately so.

Congress' decision to create the Title IV acid rain program is important for three reasons. First, it shows yet again Congress' understanding that NSR is not triggered when existing facilities undergo life extension projects allowing them to operate within existing, regulated capacity. Second, Title IV demonstrates that Congress deliberately avoided requiring universal retrofitting of new source pollution controls on existing coal-fired facilities. Third, Congress pioneered the use of "market-based" tools (cap-and-trade) rather than command-and-control measures (such as NSR), for the explicit purpose of striking a balance between pollution abatement and economic prosperity. These assumptions underlying the 1990 Amendments regarding power plant operation, and the very cap-and-trade mechanism that Congress created in this legislation, belie claims that NSR required all existing units to "retrofit or shut down."

C. Grandfathering in the Clean Air Act; Congress did not play Petitioners' argued "expectations" game.

Despite ample opportunity, particularly including during significant amendment of the Clean Air Act, at no time between 1970 and 1990 did Congress statutorily mandate immediate reductions in air emissions from existing facilities, exempt sources entirely from the need to reduce emissions, or

impose pollution cuts on existing sources after "grandfathering" them for some limited period of time.

In instances where Congress instituted limited "grandfathering," the relevant statutory language does not require mystical divining of an unwritten reality. Instead Congress spoke clearly and unambiguously to the issue. For example, the 1970 Clean Air Act Amendments provided a 90-day grace period for existing sources to bring their emissions of Hazardous Air Pollutants ("HAPs") to within prescribed limits. Pub. L. No. 91-604, § 4(a), 84 Stat. 1676, 1685-86 (1970) (enacting 42 U.S.C. § 7412); *see also* 116 Cong. Rec. 33115 (1970) (statement of Senator Prouty: "An innovative feature of the [1970] bill, in keeping with the urgency of the problem, is the establishment of definite deadlines.") Likewise, section 112, as revised by the 1990 Amendments, gives existing sources three years to comply with the Maximum Available Control Technology for air toxics. 42 U.S.C. § 7412(i)(3).

Instead of a definite time-measured mandate, the Clean Air Act trigger for subjecting existing sources to NSR, a source triggers NSR when and if it undertakes activity that creates, *new*, heretofore unregulated, pollution.

Petitioners argue that the NSR program mandates some unspecified grandfathering that eventually forces all sources into NSR. This confuses an expectation—that some number of existing sources might eventually be replaced with new sources—with a statutory mandate ultimately compelling installation of advanced controls on all existing sources. Manifesting this confusion is Petitioners' misplaced reliance on a passage from the House report on the 1977 amendments quoting an industry representative's statement to the effect that "[p]roven FGD [flue gas desulfurization] systems are justified for new plants utilizing higher sulfur fuel where sizable emission reductions are needed to meet new source performance standards. * * * [I]t is imprudent to backfit

FGD into existing plants, especially older units facing retirement within 10-15 years." This remark apparently serves as a rhetorical "forehead of Zeus" from which purportedly springs a fully-formed statutory requirement. Certainly Congress would make such a significant policy decision in a more direct and explicit way.[8] Yet even a cursory examination of the quoted passage reveals that the "10-15 years" reference is not a limitation on the universe of existing plants for which backfitting FGD would be imprudent. It is simply a specific illustration—a subset of the universe of existing units for which such backfitting would be "especially" imprudent.

Such practical considerations aside, what this report actually says is that some Members of Congress may have expected that some existing power plants would be retired and new ones constructed. And this indeed has occurred. It certainly does not, however, indicate that Congress has adopted statutory language designed to compel this outcome. Building upon this misconstruction of the 1977 CAA Amendments' legislative history, Petitioners proceed to torture the relevant case law in their attempt to make it confess cooperation with Petitioners' argument. For example, Petitioners attempt to liberate the D.C. Circuit opinion in *Alabama Power v. Costle*, 636 F.2d 323, 400 (D.C. Cir. 1979)—which actually described the 1977 Clean Air Act

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[8] Amici Waxman, *et al.*, particularly elevate this remark (Amici Waxman, *et al.* Brief at p. 21) stating, "Congress's decision to allow these sources to continue operating without NSR controls was based on the expectation that many 'older units fac[e] retirement in 10-15 years,' meaning that they would have to be refurbished—and controlled—if they were to continue operating." Certainly Congressman Waxman appreciates the nature of estimates. See, *e.g.*, Cong. Waxman letter to Congressional leadership reminding that estimates offered to and/or relied upon by government are just that and can prove to be conservative (in the context of the Department of Homeland Security cost estimates), at http://www.democrats.reform.house.gov/Documents/20040827140714-65532.pdf.

Amendments as intending to "grandfather existing Industries," but not create a "perpetual immunity from all standards, under the PSD program"—from its long-understood meaning and scope to now stand for a proposition that the court never addressed, specifically, that increasing pollution for PSD purposes means something more than increasing the capacity of the facility to emit. In *Alabama Power*, no party challenged the provision of the 1978 PSD rules requiring an increase in the "potential emission rate" of a source for there to be a "modification." Thus, the *Alabama Power* court's explanation that "Congress wished to apply the permit process . . . only where industrial changes might increase pollution," and its related observation regarding "perpetual immunity," merely recognize that existing sources become subject to NSPS and PSD when they undertake §111 modifications.

Similarly, statements by the Seventh Circuit in *Wisconsin Electric Power Co. v. Reilly,* expressing concern over opening "vistas of indefinite immunity from the provisions of NSPS and PSD," must be read in the context of the Circuit's rejection of *Wisconsin Electric Power*'s rather bold argument that "massive" and "unprecedented" projects, enabling facilities to increase their hourly emitting *capacity* by up to 40 percent, were routine maintenance that failed to trigger NSR. 893 F.2d 901, 909-10 (7th Cir. 1990).

II. THE NEW SOURCE PROGRAMS MODIFICATION RULE APPLIES ONLY TO EXISTING SOURCE CHANGES THAT CREATE NEW AND UNREGULATED POLLUTION.

The definition of "modification," which is the trigger for every new source program in the Clean Air Act, reflects Congress' deliberate and fundamental policy distinction between regulation of new sources of pollution and existing

sources of pollution. This understanding has been a central feature of the Clean Air Act since 1970.

A. The Modification Rule focuses on new emissions capacity.

The New Source Programs modification rule arises from the 1970 Clean Air Act Amendments and the NSPS program they created. At that time, Congress required review of "modification" for reconstruction as well as "construction" activities because both can create new capacity to emit. H.R. Rep. No. 91-1146, at 10 (1970) ("[N]ew sources may take the form either of entirely new facilities or expanded or modified facilities. . . ."). The Clean Air Act defines "modification" as any physical or operational change "which increases the amount of any air pollutant emitted by such source." 42 U.S.C. § 7411(a)(4). Accordingly, the "modification" definition from its inception focused on activity creating new (*i.e.*, unregulated) emissions, and until this enforcement was initiated, EPA never interpreted the term "modification" to the contrary.

It is inarguable from the text and structure of the 1977 Amendments that Congress carried over this NSPS meaning of "modification" to the NSR program. *See, e.g.*, 42 U.S.C. § 7501(4). The legislative history of the 1977 amendments confirms that Congress focused NSR on new emissions—not on the use or maintenance of existing facilities and their already-regulated emissions capacity. S. Rep. No. 95-127, at 55 (1977) (Congress determined that "some mechanism [was] needed to assure that before *new and expanded* facilities are permitted, a State demonstrate that these facilities can be accommodated within its overall plan to provide for attainment of air quality standards.") (emphasis added); *see* 123 Cong. Rec. 18,021 (1977) (Senator Muskie, one sponsor of the 1977 Clean Air Act Amendments, noted that the NSR procedures "apply only to new major emitting facilities and

do not affect existing facilities"); S. Rep. No. 95-127, at 29 (1977); *see also* 123 Cong. Rec. 18,040 (1977) (statement of Senator Randolph) ("[T]he nondeterioration section [PSD] applies only to major new emission sources. It does not relate to sources already in existence.").

As illustrated, *supra*, as part of the SIP process, States review and regulate emissions capacity from their resident sources. So long as the SIP assessment of the regulated emissions capacity of a source is not disturbed, air quality remains protected no matter how many hours the source operates or what physical changes are made to enable it to continue such operation. Congress specifically intended the term "modification" to encompass only activity that increases the capacity of a facility to emit—not the use of existing capacity as constructed and permitted, recognizing the redundancy inherent in reviewing these sources again unless the source is changed in a way that creates new, heretofore unregulated emissions. *See Puerto Rican Cement Co. v. EPA*, 889 F.2d 292, 298 (1st Cir. 1989) ("[T]he statute refers to the '*construction*' of facilities, not to *increased use of existing facilities*.").

B. NSPS and NSR are closely related programs sharing common features, including the same definition of "Modification."

1. *Congress deliberately defined NSR modification by reference to NSPS modification.*

Far from scrapping the NSPS model and beginning anew when crafting NSR, Congress instead modeled the statutory NSR program after EPA's 1974 regulatory PSD program, in which EPA defined "modification" precisely as in the NSPS program, emphasizing the Administrator's intent for "the definition of modification under Part 52 [addressing PSD] to be consistent with the final definition of this term under

Part 60 [governing the NSPS program]." *See* 39 Fed. Reg. at 42,513 (Dec. 5, 1974).

In 1977, Congress codified the NSR program, incorporating the NSPS definition of modification into the NSR definition. *See, e.g.*, 42 U.S.C. §7501(4) ("The terms 'modifications' and 'modified' mean the same as the term 'modification' *as used in* section 7411(a)(4) of this title [the NSPS program].") (emphasis added).[9]

That Congress expressly incorporated the NSPS definition into the statutory NSR program is not simply a case in which two related programs, in the same Act, have identical words that should normally be given the same meaning. *See Sullivan v. Stroop*, 496 U.S. 478, 484 (1990). Here, Congress expected that NSR review would occur in conjunction with NSPS review and that the process would be much the same. H. Rep. No. 95-294, at 144-45 (1977). This was also a major concern for EPA when creating the regulatory PSD program. *See* Approval and Promulgation of Implementation Plans: Prevention of Significant Air Quality Deterioration, 39 Fed. Reg. 42,510, 42,512 (Dec. 5, 1974). Appropriately, EPA itself has recognized the close ties between the NSPS and NSR programs. 68 Fed. Reg. 61248, 61268 (Oct. 27, 2003)

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[9] Congress codified EPA's regulatory program in the 1977 amendments with some alterations, for instance, strengthening the statutory NSR program's control technology requirements from those required by EPA in the regulatory program, reflecting the concern expressed at the time by Senator Muskie that there existed a "gap" between "actual best available technology and what has been required under new source performance standards." 123 Cong. Rec. 18,022. Senator Muskie's statement, that "the record to date under the [NSPS] approach has been disappointing," 123 Cong. Rec. 18,022 (June 8, 1977) (quoted in Pets. Br. 5), specifically referred to the difference in "control" technology between BACT and NSPS, not to the scope of applicability of NSPS or PSD to activities at existing facilities. *See id.*; *see also id.* at 18,018 (The new NNSR provisions "establish controls more stringent than the [pre-existing NNSR] ruling by EPA.") (emphasis added).

("The NSR program's scope is closely related to the scope of the NSPS program."). In fact, given the explicit cross-incorporation between the PSD and NSPS definition, the *application* of NSPS and "major modification" review under NSR should be identical. *See IBP, Inc. v. Alvarez*, 126 S. Ct. 514, 523 (2005).

Here, Congress once again acted deliberately, incorporating by reference to an existing term having a recognized, accepted meaning. Congress failed to qualify "mean the same as" with, for example, "but only for statutory purposes, not for regulatory implementation purposes at which point its meaning may be as the Agency decides." Such qualification is precisely what the court in *United States v. Cinergy Corp.*, No. 06-1224 (7th Cir. 2006) would read into the statute.

2. *NSPS and NSR share overlapping regulatory goals.*

Unable to find support for their position in the statutory language, Petitioners argue that the NSPS and PSD programs have fundamentally different purposes requiring that coverage of projects undertaken at existing facilities be broader under the PSD program than under the NSPS program. Specifically, they argue that because the PSD program is an "ambient-based" program, whereas NSPS is a "technology-based" program, preconstruction permit coverage must be coterminous with the activities that consume the PSD "increments." These claims are specious.

Petitioners' argument fundamentally ignores that, starting with the 1970 CAA, both technology requirements and ambient-based preconstruction review were triggered by NSPS "modification" activities. Specifically, under the 1970 Act, preconstruction review to ensure compliance with the NAAQS was triggered by NSPS "modification," 42 U.S.C. §§ 7410(a)(2)(D), (a)(4), that being activity that created new pollution. By contrast, preconstruction review was *not*

triggered by existing emissions already reviewed and regulated under the SIP—like emissions resulting from increased hours of operation or from switches to an alternate fuel that the source was designed to accommodate. In other words, like nearly everything else in the Clean Air Act regulatory scheme, the decision to exclude these changes from the definition of "modification" under the 1970 Act emerges as a deliberate decision in the context of a regulatory regime where SIPs regulate emissions from existing sources at full capacity to ensure attainment and maintenance of the NAAQS. Under this regime, because all pollution up to an NSPS "modification" would be fully accounted for in the SIP, variations in operation of existing capacity would not trigger preconstruction review (as EPA made clear in its early regulations defining modification for NSPS and PSD), while "new pollution" that had not been reviewed would have to undergo review to assure "attainment and maintenance" of NAAQS.[10]

Furthermore, arguments seeking to defeat Congress' instruction that "'modifications' and 'modified' mean the same as the term 'modification' *as used in* [the NSPS program]," by extrapolating different meanings between the terms through touting differing purposes of the PSD and NSPS programs, also ignore the fact that some activities that could cause NAAQS exceedances or consume the PSD "increment" are not, and have never been, regulated under the preconstruction permit programs. For instance, Petitioners suggest that because the "baseline" for increment consumption accounting purposes in PSD areas is based on an area's air quality, any activity that increases "actual emissions" and

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[10] For such reasons, in its preamble of the 1980 Rules, EPA articulated disagreement with commenting parties that had argued the focus of NSPS was based solely on technology, explaining that "the decision to develop the NSPS is clearly based on ambient air quality concerns." 45 Fed. Reg. at 52,691-92 (Aug. 7, 1980).

potentially affects the air quality must necessarily trigger PSD preconstruction review. Pets. Br. at 40-41. This is incorrect.

Petitioners' view conflates "baseline" for purposes of increment accounting, which is the date of the first PSD permit application filed in a PSD area, *see* 42 U.S.C. § 7479(4) ("[t]he term 'baseline concentration] means, with respect to a pollutant, the ambient concentration levels which exist at the time of the first application for a permit in an area subject to this part"), with "baseline" for applicability purposes (*i.e.*, for determining whether a particular activity increased emissions and thus was a "modification"), which is a period shortly before the activity, see, *e.g.*, 40 C.F.R. § 52.21(d)(21)(ii) (establishing as a baseline date "a two-year period which precedes the particular date and which is representative of normal source operations'). These two dates can be separated by years—indeed, decades, for projects conducted in the late 1980s through 2000, as is the case here—and thus bear no relationship to each other.

Moreover, even where a correspondence between the two exists, Petitioners' argument proves too much. As recognized in *Alabama Power v. Costle*, a fuel switch to a higher-emitting fuel allowed under a facility's permit potentially consumes increment, but has always been excluded from PSD review. 636 F.2d at 378. In the court's own words, this argument "conflates the different yet complementary functions of [pre-construction] review and calculation of increment consumption." *Id.* EPA's longstanding definition of "modification" in both its NSPS and NSR programs has excluded from the definition increased hours of operation within permitted capacity. 40 C.F.R. §§ 51.166(b)(2)(iii); 60.14(e)(3). Yet, under Petitioners' reasoning *every* exclusion under the PSD rules (fuel switch, production rate, hours of operations, *etc.*) would be illegal, since every exclusion necessarily describes activity that potentially consumes incre-

ment but that is not subject to pre-construction review. This cannot be correct.[11]

Arguments about the ostensibly different purposes of the NSPS and PSD programs ignore the fact that, like the NSPS program, the PSD program is both technology-based and ambient-based. As discussed above, the 1970 Clean Air Act Amendments combined a technology-based NSPS program, *see* 42 U.S.C. § 7411, and an ambient, NAAQS-based "pre-construction" program, *see* 42 U.S.C. § 7410(a)(4), with the same trigger for projects at existing facilities—an NSPS "modification." Under the 1974 PSD program, a "technology-based" program requiring installation or the best available control technology ("BACT") and an "ambient-based" program designed to protect "PSD increments" in attainment areas were merged in one PSD program. In this program, the permits required that new emissions capacity comply with BACT, NAAQS and the PSD increment program.

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[11] EPA recognized as much, again in the 1980 Rules preamble, discussing how States can should address this issue: First, noting that the increments must be protected separately from any pre-construction requirements, EPA explained that the State must periodically review air quality and take "corrective action" if the increments are exceeded. This is one of the aspects of the PSD programs that Congress specifically "tightened" in 1977. *See Alabama Power v. Costle*, 636 F.2d at 361-64. Under the 1974 PSD rules, there was no requirement (or authority) to take action to protect the increments if they are exceeded due to "non-modification" activity (*e.g.*, fuel switch). 45 Fed. Reg. at 52,677 (Aug. 7, 1980). Second, EPA explained that States could "revise SIPs and/or issue operating permits so that SIP requirements and permits reflect actual source operating conditions." *Id.* at 52,721-22. If the State does the latter—*i.e.*, revise a source's permit to limit hours of operations, as the example in the preamble posits, *see id.* at 52,705—any increase in hours in excess of an enforceable permit limit, whether made possible by maintenance work or not, would trigger PSD. If the permit does not restrict hours, however, there is no basis in the regulations, or in logic, to differentiate between the two types of increases in hours of operation of the existing unit.

CONCLUSION

Electric utility operations routinely fluctuate, by the hour, day, month, and year. This is due to variable demand driven by many factors including the weather, economic health, and the availability of other units on the system. Utilities are legally obligated to keep their units in good repair to respond to the market's fluctuations. They are issued permits that do not limit their operating hours, enabling them to meet these obligations.[12] To ensure that these fluctuating source-specific emissions do not interfere with attainment or maintenance of the NAAQS, State regulators at the technical air quality planning level issue permits to utility sources that either reflect a specific emission limit or assume round-the-clock operations, and translate the relevant pollution numbers into the overall States' attainment and maintenance plans.

At the more basic level, this approach to air quality planning reflects the fundamental distinction between existing source pollution, which is fully accounted for and subjected to a NAAQS compliance-driven level of control, and green-field units and modified sources creating "new" pollution. The Clean Air Act's language and history make clear that the NSR and NSPS programs were always intended by Congress to address and apply to this *new* pollution (emissions from new sources). Old pollution (emissions from existing sources), no matter how it fluctuates within the universe of emissions generated by existing sources, is controlled by other (*i.e.*, non-NSR) Clean Air Act programs. In their pursuit of a major policy shift serially rejected by Congress,

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[12] EPA has consistently recognized that Congress did not intend to regulate such fluctuations. *See* 68 Fed. Reg. 61,253 (Oct. 27, 2003). ("[A]pplication of the major NSR program to 'modified' plants is [not] designed to require existing plants that are continuing to operate in a manner consistent with their original design to curtail their rate of production or hours of operation beyond limitations set forth in their existing permits."); *see also* 45 Fed.Reg. 52,704 (Aug. 7, 1980).

Petitioners make "grace period" or "grandfathering" arguments and other similar claims that fundamentally misstate and misconstrue all of the major policy choices made by Congress throughout the entire life of the Clean Air Act.

In turn, the common definition of "modification," to be applied in the context of the NSR and NSPS programs, was developed in response to, and is driven both by these overarching regulatory policy imperatives and by Congress' decision to regulate old and new pollution in fundamentally different ways. Petitioners indicate that failure to adopt their desired policy shift will result in a policy hole in America's air pollution regulations. To the contrary, revising the definition "of modification" along the lines suggested by the Petitioners so as to apply NSR to the fluctuating emissions of already-regulated pollution would defeat congressional intent and effectively emasculate the non-NSR Clean Air Act programs. The Court should refuse to indulge in such a fundamental re-write of one of this nation's most important and carefully balanced regulatory statutes.

Respectfully submitted,

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DUKE ENERGY CORP., ET AL.,
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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* U.S. REPRESENTATIVE JOE L. BARTON IN SUPPORT OF THE RESPONDENTS

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BRIEF OF *AMICI CURIAE* U.S. REPRESENTATIVE JOE L. BARTON IN SUPPORT OF THE RESPONDENTS

STATEMENT OF *AMICUS CURIAE* IDENTITY AND INTEREST[1]

U.S. Representative Joe L. Barton files this amicus brief to correct Petitioners' and others' inaccurate representations of Congressional intent. Representative Barton participated in the lengthy legislative debates and discussions that led to the 1990 amendments to the Clean Air Act ("CAA" or the "Act")

[1] Pursuant to Supreme Court Rules 37.3 and 37.6, the undersigned represents that (1) all parties consented to the filing of this brief; (2) no counsel for any party authored this brief either in whole or in part; and (3) no person or entity other than the above-named *amici* curiae and their counsel made any monetary contribution to its preparation or submission.

and, as Chairman of the House Committee on Energy and Commerce with Clean Air Act oversight responsibility has a unique interest in ensuring that the Act is correctly construed and properly and fairly implemented.

INTRODUCTION

Chairman Barton respectfully requests that this Court take note that the conclusion advanced by Petitioners and a number of Amici Curiae Waxman, *et al.* (hereinafter, "Petitioners") in *Environmental Defense, et al., v. Duke Energy Corp., et al.*—that the Act's New Source Review program was intended to serve as an omnibus pollution control regime ultimately applicable to all existing sources electing to continue in operation—is wrong for reasons made quite clear by the Act's history, language and implementation.

First, Congress never intended New Source Review as a principal vehicle for achieving pollution control from existing sources. Had Congress intended such an outcome it would have said so, as revealed by the Act's very deliberate construction. Instead, Congress intentionally chose a regulatory regime where existing sources of pollution were principally regulated by the individual states. Moreover, as the program's name implies, Congress intended New Source Review to address new sources of otherwise unregulated pollution—that is, newly constructed sources or those that undergo "modification" expanding their capacity to emit.

The Act's history is replete with clear illustrations that the counterintuitive reading advanced by Petitioners was not in fact Congress' intent. That the radical policy shift Petitioners advocate would make significant Clean Air Act regulatory programs superfluous is but one example. Further, Congress expressly addressed and rejected Petitioners' suggested policy both in the 1977 and 1990 CAA amendments.

The Fourth Circuit accurately determined that EPA's 1980 "modification" rule must be consistent with Congress' view that neither the New Source Review program ("NSR") nor the New Source Performance Standards Program ("NSPS") (hereinafter, "New Source Programs") were intended to be the primary regulatory mechanism for reducing pollution from existing sources.

SUMMARY OF THE ARGUMENT

Congress's goal in enacting and amending the Clean Air Act has always been to reduce air pollution to protect public health. Instead of requiring each plant to cut pollution by retrofitting new pollution control technologies, Congress chose pollutant-specific National Ambient Air Quality Standards ("NAAQS"). EPA was charged with periodically reviewing the standards and revising them in line with contemporary scientific information on public health needs. Meanwhile, Congress gave the States authority to implement the standards.

Contrary to Petitioners' arguments, Congress did not intend to confront stationary sources with an option of either shutting down or retrofitting new advanced pollution controls within a specified period of time. Unlike other CAA control regimes, Congress did not enact the New Source Programs to reduce emissions from existing sources operating in accordance with their original design capacity. Instead, pollution from existing sources was to be, and is, controlled through the air quality implementation plans developed by the States. In contrast, the New Source Programs' goal was to spur technology development by matching the pollution control performance of new facilities or existing facilities building expansions with state of the art pollution control at the time the new source or expansion is initiated. Emissions from existing facilities not so "modified" remain within the discretion and purview of the individual States to devise

and implement actions to attain the NAAQS, subject to EPA approval, as provided in the 1970 and 1977 CAA Amendments.

Congress did not intend that New Source Programs be triggered by activities that accomplish nothing more than enabling a facility to operate as constructed and within permitted limits. Had Congress so intended, it would have plainly said so in statutory language and in the legislative history. It did neither.

Nor do New Source Programs otherwise disrupt Congress' deliberately constructed hierarchy of Clean Air Act regulatory programs for obtaining emission reductions from existing sources, with NSR created to respond to activities adding new pollution for which States had not previously accounted in their role as primary regulatory authority over existing facility emissions.

Construing the term "modification" to include "the most mundane activities" at existing sources, *regardless of whether they actually create new pollution*, requires believing that Congress intended to make redundant and/or obsolete other regulatory programs it went to great effort and detail to enact, and that Congress intended to drive the entire emission inventory attributable to the operations of major stationary sources down to the lowest, technologically feasible levels within a relatively short window of time. The structure and entire legislative history of the Act defy this conclusion.

Petitioners' view of NSR begs the question why Congress bothered to enact the highly complex CAA programs, such as the landmark Title IV acid rain provisions and elaborate Title I reasonable further progress ("RFP") provisions designed to independently achieve NAAQS attainment, which Petitioners would make redundant and unnecessary. This outcome defies credulity and all available evidence, seeking to institute "regulation by litigation instead of by notice and comment

rulemaking." *See United States v. Alabama Power Co.*, (N.D. Ala.; Case No. 2:01-cv-00152-VEH (Memorandum Opinion, Aug. 14, 2006)).

Congress developed an extensive hearing record, in the years-long debate over the 1990 Amendments, to assess the sufficiency of extant programs including NSR and NSPS to attain the large additional reductions in key air pollutants necessary to address acid rain. Congress concluded and plainly articulated that NSR was neither capable of securing nor designed to secure emission reductions from existing sources.

Construing the NSR provisions established by the CAA Amendments of 1977 as Petitioners request would therefore ignore this history and also strip the subsequently enacted 1990 Amendments of any discernible meaning. It is axiomatic that such a construction defies congressional intent, specifically as reflected in at least the major 1977 and 1990 CAA revisions. This Court should therefore reject Petitioners' construction of the Act and the 1980 NSR regulations.

ARGUMENT

I. CONGRESS DID NOT INTEND THE NSR PROGRAM TO THREATEN ALL EXISTING FACILITIES WITH A "SUBMIT OR SHUT DOWN" ULTIMATUM UPON EXPIRATION OF SOME UNWRITTEN "GRACE PERIOD" OR "GRANDFATHERING."

A. The Clean Air Act Represents a Deliberate, Comprehensive Regulatory Regime Enacted by Congress.

Congress deliberately titled its "New Source" Programs as such because these Programs were intended to cover new facilities, that is, new and otherwise unregulated *capacity* to pollute, or "new sources." These include existing sources

that are "modified" to create new pollution not yet regulated under the CAA programs for existing sources of pollution, thereby protecting public health and welfare. The Act's evolution clearly and obviously reveals this scheme.

While Congress, through its 1970 Clean Air Act amendments, introduced a federal requirement for States to comply with the NAAQS, *see* 42 U.S.C. § 7409, Congress also reserved "primary responsibility" for the States to attain and maintain NAAQS, *see* 42 U.S.C. § 7401(a)(3); *see also Union Elec. Co. v. EPA*, 427 U.S. 246, 269 (1976) (emphasizing that Clean Air Act section 110 left to the States "the power to determine which sources would be burdened by regulations and to what extent"). This hierarchy reflects Congress' considered judgment that State governments better under-stand local needs and circumstances and are thus best able to craft appropriately tailored programs to improve air quality. *See, e.g., Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 470-71 (2001); *id.* at 493 (Breyer, J., concurring in part and concurring in the judgment); *General Motors Corp. v. United States*, 496 U.S. 530, 532-33 (1990).

This same conclusion—that States are better suited to determine local conditions, needs and solutions—informed Congress' decision to leave to the States with discretion over what specific retrofit measures were needed to attain the NAAQS. Thus, each State's individual State Implementation Plan or "SIP" articulates how best to achieve the Act's air quality goals through emission reductions and controls from sources within each State's border. *See* 42 U.S.C. § 7410. In the SIP, the State calculates an attainment-level "emissions budget," comparing it with the existing and projected baseline "business as usual" emissions level. The State is thus able to determine the required aggregate emission reductions, and to assign detailed emissions limitations to existing sources to achieve this required quantity of reductions.

It is noteworthy that Congress did assert federal primacy for regulating particular categories of pollution. These national programs generally focus on sources that individual States are unable to control such as automobiles and other mobile source standards. This reinforces State primacy over pollution sources they can control such as large stationary sources. The interpretation of the NSR program that Petitioners advance, by contrast, both subverts the State's regulatory primacy in this area and significantly revises the CAA's scheme by abandoning the concept of State discretion over how to regulate existing sources to attain the NAAQS.

Finally, it is important to note that existing facility emissions from sources operating as constructed and permitted to operate and not installing or creating new capacity ensure attainment, and are, therefore, by definition not "increas[ing] pollution." In establishing individual source emissions limits, States assume the *maximum potential* emissions from each existing source—based on around-the-clock operations, unless otherwise limited by an enforceable permit term. A State must demonstrate that with the controls implemented for each source it will attain the standard for the relevant criteria pollutant by the required attainment date, even with all sources operating at maximum capacity. As a result, the relevant SIP already takes into account all the existing air pollution capacity in a way designed to attain and maintain the NAAQS. There is, therefore, no new pollution capacity created by a source that repairs a broken or failing component so that the source can continue to operate as it was constructed and permitted by the State to operate, and then continues to operate in subsequent years in accordance with the SIP and its Clean Air Act permits.

B. Congress Deliberately Designed Different Programs to Control New Versus Existing Sources.

NSR has always been focused on regulating new capacity to pollute, that is, on managing new growth. It was never about obtaining additional reductions from existing facilities as Petitioners now advance. Such a result would blur and indeed obviate Congress' clearly drawn lines. What Petitioners actually seek is judicial implementation of a 1997 internal enforcement policy memo to impose this radical policy change[2]—eviscerating major programs specifically designed to regulate precisely those sources.

1. *NSR was designed to address new sources.*

Although State-level SIP actions are the principal Clean Air Act mechanism to achieve NAAQS compliance, Congress also envisioned several CAA regulatory measures directed exclusively at new sources. Congressional considerations in adopting those new source provisions included avoiding industrial relocation, or "forum shopping," which Congress addressed by calling upon new sources to install advanced pollution controls, irrespective of the local air quality needs,

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[2] See, *e.g.*, "[A] 1997 enforcement memorandum leaked to the media . . . shows EPA's desire to force additional reductions in emissions by arbitrarily revising enforcement practices instead of the more appropriate regulatory process complete with its public comment and review requirements. In 1998, the EPA changed enforcement practices when they renounced the 1992 NSR interpretation in a proposed rule calling parts of the WEPCO decision a departure from Agency policy which should not be continued. . . . Finally, in 1999, the EPA filed NSR lawsuits against seven electric utility companies and an administrative enforcement order against the Tennessee Valley Authority, alleging NSR modification violations at 24 different facilities, reaching back as many as 22 years." Sen. George Voinovich, Chairman, Senate Subcommittee on Clean Air, Climate Change and Nuclear, "*The Clean Air Act's New Source Review Program: A Policy in Desperate Need of Reform,*" found at http://voinovich.senate.gov/policy_paper/nsr_whitepaper.pdf.

again while reserving primacy over existing sources to the States. H.R. Rep. No. 91-1146, at 3 (1970). Despite this and select other new source-specific regulatory programs, Congress was clear that the NSPS was a narrow departure from the overall State primacy in abating air pollution.

Numerous Members of Congress instrumental in the 1970 CAA amendments elaborated on this State/federal hierarchy in the CAA, including Representative Harley O. Staggers[3] and Representative William L. Springer.[4]

In 1974, EPA on its own initiative created the NSR program through the regulatory process.[5] Congress codified this program in 1977, incorporating in the process the NSPS definition of "modification." *See, e.g.*, 42 U.S.C. § 7501(4) ("The terms 'modifications' and 'modified' mean the same as

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[3] "The enforcement of air pollution regulations is partly the responsibility of the States and partly that of the Federal Government. The [1970 amendment] provides that the Federal Government shall have primary responsibility for the enforcement of performance standards for new stationary sources and hazardous emissions from stationary sources. The States on the other hand will have primary responsibility for the enforcement of State plans and the emission limitations provided for in those plans with regard to existing stationary sources." 116 Cong. Rec. 42, 520 (1970).

[4] Springer noted during the floor debates that NSPS was a "departure" from the ordinary division of responsibility, but that the departure was "sensible" because "[s]topping these extraordinary problems before they develop is best for the antipollution effort and it is also best for those who would build such installations and then find they could not operate." 116 Cong. Rec. 19,206 (1970).

[5] EPA established the Prevention of Significant Deterioration ("PSD") component in 1974 for sources located in attainment areas, *see* Approval and Promulgation of Implementation Plans: Prevention of Significant Air Quality Deterioration, 39 Fed. Reg. 42,510 (Dec. 5, 1974), and the non-attainment sources were subjected to NSR through a 1976 EPA rule, *see* Requirements for Preparation, Adaption [sic], and Submittal of Implementation Plans: Air Quality Standards; Interpretive Ruling, 41 Fed. Reg. 55,524 (Dec. 21, 1976).

the term 'modification' *as used in* section 7411(a)(4) of this title [the NSPS program].") (emphasis added).

As with other CAA decisions described herein, this was a deliberate act. By incorporating the NSPS modification definition into the NSR program, Congress ensured that existing sources traditionally addressed at the State level became subject to federal requirements to install new pollution control equipment only when projects at these sources increased their capacity to emit pollutants—which is the clear threshold for becoming a "new source" of pollution.

It was for these reasons that Congress never described NSR as a program to decrease emissions from existing sources. Despite its current litigation posture, EPA agrees—recently declaring that to interpret the Clean Air Act to "ensure that all major facilities eventually trigger NSR cannot be squared with the plain language of the Clean Air Act." *Prevention of Significant Deterioration (PSD) and Non Attainment New Source Review (NSR): Equipment Replacement Provision of the Routine Maintenance, Repair and Replacement Exclusion*, 68 Fed. Reg. 61,248, 61,273 (Oct. 27, 2003).

Similarly, EPA also acknowledges Congress' view that SIPs, not NSR programs, were the primary vehicle for obtaining emissions reductions: "Rather than NSR, the Act's primary mechanisms for achieving the emission reductions needed to attain or maintain NAAQS are State Implementation Plans." Brief of the Envtl. Prot. Agency 75, *New York v. EPA*, 413 F.3d 3 (D.C. Cir. 2005).

2. *NSR was not designed or intended to control Existing Sources.*

Beginning in 1970, Congress repeatedly considered and rejected schemes to impose on existing sources the mandatory control technology required of new sources. For example, in 1970, Congress considered and rejected imposing NSPS

requirements on existing emissions sources covered by the SIP limits. *See* S. Rep. No. 91-1196, at 15-16 (1970).

Then, during debate over the 1977 Clean Air Act Amendments Congress again specifically rejected attempts to impose universal retrofitting of all existing major stationary sources. *See* H.R. Rep. No. 95-294, at 185 (1977):

> Building control technology into new plants at time of construction will plainly be less costly than requiring retrofit when pollution ceilings are reached. For example, testimony from the electric utility industry indicates that it costs about 25 percent less to purchase and install flue gas desulfurization technology on a new plant than it would cost to retrofit that plant subsequently.

Congress' reasoning is inescapable: requiring NSR and the installation of advanced pollution controls would be prohibitively expensive for existing sources. Congress therefore rejected using the approach of across-the-board, technology-forcing regulation for existing sources, favoring instead narrowly tailored, State-administered schemes to achieve emission reductions from existing sources. *See, e.g.*, 42 U.S.C. §§ 7491(b)(2)(A) (providing for "best available retrofit technology" for a limited class of existing facilities), 7502(c) (providing for "reasonably available control technology" ("RACT") for certain existing facilities in non-attainment areas). In this regard, the mandatory RACT requirement was limited to helping provide for the aforementioned "reasonable further progress" ("RFP") to ensure "attainment of the applicable [NAAQS] by the applicable date." 42 U.S.C. § 7501(1).

Congress certainly would have seen such a detailed scheme for existing sources as unnecessary if it had already required, as Petitioners suggest, that NSR mandate eventual universal retrofitting of advanced pollution controls on all existing

facilities.[6] Indeed, universal application of new source control technology contradicts Congress' express belief that such retrofitting would be unnecessary because of other targeted, existing source-level controls. As made clear by the principal architect of the 1977 Clean Air Act Amendments, Senator Edmund Muskie: "It is [Congress'] intent that 'reasonable further progress' means pollution control will reduce emissions at a rate that will lead to attainment of the ambient standards in the time required." 123 Cong. Rec. 18,019 (1977); *Environmental Policy Division (1978), Library of Congress, 95th Cong., 2nd Sess., A Legislative History of the Clean Air Act Amendments of 1977: a Continuation of the Clean Air Act Amendments of 1970 (1978), Washington, DC: US Senate Committee on Environment and Public Works Print.* Accordingly, the RFP requirements, including RACT-level controls, were intended to attain the NAAQS without additional reductions secured through the non-attainment NSR program.

This pattern continued during the 1980s when Congress repeatedly considered and rejected legislative proposals to impose, on existing coal-fired boilers, the choice between retrofitting with new source control technologies and shutting down. *See* S.321, 100th Cong. (1987); S.316, 100th Cong. (1987); S.300, 100th Cong. (1987); S.2813, 99th Cong. (1986); S.2203, 99th Cong. (1986); S.2200, 99th Cong. (1986); H.R.4567, 99th Cong. (1986); S.52, 99th Cong. (1985); H.R.5555, 97th Cong. (1982). That Congress

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[6] As explained in both the utility and industry *amici* briefs, the types of projects that Petitioners contend trigger NSR are similar to projects undertaken every year across industry by every industrial facility merely to maintain the ability to operate as constructed and permitted to operate. If one accepts at face value the complaints filed by citizen groups and the Government in the NSR enforcement initiative, every individual industrial facility in this country has routinely triggered NSR preconstruction permitting under the NSR program year after year since 1980.

bothered considering these sector-specific bills reveals its understanding that all existing facilities do not ultimately trigger NSR. Rejecting the proposals only affirms Congress' intent that ultimate NSR coverage of all industrial facilities could not be the case. The present EPA NSR enforcement initiative implausibly assumes that the entire electric utility industry, refining industry, and much of the American industrial sector were for decades all in massive non-compliance with existing regulatory requirements. That Congress engaged in the major 1977 and 1990 rewrites of the Clean Air Act without taking notice of such an anomaly, were it real, only further exposes the unsupportable nature of EPA's litigation position.

In sum, the history of the Clean Air Act prior to its 1990 Amendments manifests repeated congressional rejection of Petitioners' preferred "retrofit or shut down" mandate to control emissions from existing sources. Instead, Congress left decisions regarding existing-source pollution primarily to the States and reserved authority to EPA only in limited areas consistent with the statutory hierarchy, explicitly avoiding the massive economic disruption that would follow from a heavy-handed, top-down approach to controlling pollution from existing sources.[7]

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[7] In fact, EPA had the same understanding when it included the reconstruction provision in the NSPS rules. Reconstruction is an exception to the requirement that an emissions increase triggers NSPS for an existing unit. When an existing unit expends 50% or more of the cost of a comparable entirely new facility, then that expenditure triggers application of NSPS. This is because EPA, like Congress, understood new source controls rarely apply to existing sources, and thus only required retrofitting new source controls when creating new and unregulated pollution or spending so much on an old facility that it becomes in essence a new facility. 40 Fed. Reg. 58,416 (Dec. 16, 1975) (final rule); 39 Fed. Reg. 36,946 (Oct. 15, 1974) (proposed rule), *id.* at 36,948 ("The purpose of this proposed [reconstruction] provision is to discourage the perpetuation of a facility, instead of replacing it at the end of its useful life with a newly constructed facility.").

3. *NSR was deliberately designed to address growth.*

As Congress repeatedly confirmed that mandatory new source pollution control retrofits from existing sources was not the law, Congress also staked out a deliberate role in the overall Clean Air Act scheme for EPA's regulatory PSD and NNSR programs. The 1977 Clean Air Act Amendments established a PSD "increment" program managing growth in areas meeting air quality standards to ensure that air quality did not significantly deteriorate. *See* 42 U.S.C. § 7470 (PSD program is intended "to protect health and public welfare from any actual or potential adverse effects . . . notwithstanding attainment," while ensuring that economic growth "will occur in a manner consistent with the preservation of existing clean air resources.") As EPA recently explained, "the NSR program is a growth measure and is not specifically designed to produce emission reductions. Instead, its purpose is to allow new source growth to occur without interfering with an area's ability to attain." Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard, 69 Fed. Reg. 23,951, 23,986 (Apr. 30, 2004).

NSR's focus on new emissions growth, and not on increased utilization of existing permitted emissions capacity, reflects Congress' balancing of economic and environmental concerns. The Clean Air Act repeatedly took care to note its goal, in addition to protecting and improving the nation's air quality, of regulating in a fashion that is protective of the American economy. 42 U.S.C. § 7401(b)(1). The purpose of the 1977 Amendments, which included the NSR provisions, was to "insure the protection of the public health and the environment . . . while at the same time considering the energy and economic needs of this Nation." H.R. Rep. No. 95-294, at 34-35 (1977). Futher, Congress declared that the occurrence of economic growth is among the purposes of the PSD provisions in the Clean Air Act. 42 U.S.C. § 7470(3).

Petitioners ignore these express considerations by predicating mandatory retrofit of new source control technology on the act of performing maintenance on existing productive capacity. Thus, while Petitioners cite the Act's purpose in their attempt to support the need to interpret "modification" differently in NSPS and PSD, they conveniently avoid citing the entirety of the Act's stated purpose.

4. *In the 1990 CAA Amendments, Congress reaffirmed previous regulatory choices, and strengthened controls on existing sources, without altering NSR's role in the hierarchy.*

The 1990 Clean Air Act Amendments further affirm that NSR does not mandate all existing units eventually to retrofit mandatory new source control technology, and that NSR does not apply when existing power plants undertake activities not changing their original design capacity, even if those activities extend the source's productive life.

A major objective of the 1990 Clean Air Act Amendments was to mitigate potential environmental damage from acid rain. The major pollutants implicated in acid rain are sulfur dioxide ("SO_2") and nitrogen oxides ("NO_x"). Consequently, Congress required significant reductions in SO_2 and NO_x emissions. When considering potential control tools, Congress understood that electric utilities that were never subject to the NSPS or NSR programs were undergoing refurbishment and life extension work, that they would be operated without new source pollution controls beyond 2010, and that their longer operating lives and increased utilization would cause a steady rise in national emissions in compliance with extant Clean Air Act permits and regulations. *See* 42 U.S.C. §§ 7651(a)(28)-(29), 7651(b).

Congress nonetheless elected against requiring each existing power plant to retrofit new source pollution control equipment, favoring instead a national cap-and-trade regime

designed to reduce SO_2 emissions much more efficiently and at much lower cost than by mandating uniform technology. Congress also achieved a reduction in NO_x emissions of approximately two million tons under Title IV, and addressed the long-range transport of NO_x. 42 U.S.C. § 7651(b). These provisions, not NSR, were designed to generate massive reductions in air pollution from existing sources. Unlike applying NSR to existing facilities, the Title IV acid rain program did so with economic efficiency, and deliberately so.

Congress' decision to create the Title IV acid rain program is important for three reasons. First, it shows yet again Congress' understanding that NSR is not triggered when existing facilities undergo life extension projects allowing them to operate within existing, regulated capacity. Second, Title IV demonstrates that Congress deliberately avoided requiring universal retrofitting of new source pollution controls on existing coal-fired facilities. Third, Congress pioneered the use of "market-based" tools (cap-and-trade) rather than command-and-control measures (such as NSR), for the explicit purpose of striking a balance between pollution abatement and economic prosperity. These assumptions underlying the 1990 Amendments regarding power plant operation, and the very cap-and-trade mechanism that Congress created in this legislation, belie claims that NSR required all existing units to "retrofit or shut down."

C. Grandfathering in the Clean Air Act; Congress did not play Petitioners' argued "expectations" game.

Despite ample opportunity, particularly including during significant amendment of the Clean Air Act, at no time between 1970 and 1990 did Congress statutorily mandate immediate reductions in air emissions from existing facilities, exempt sources entirely from the need to reduce emissions, or

impose pollution cuts on existing sources after "grandfathering" them for some limited period of time.

In instances where Congress instituted limited "grandfathering," the relevant statutory language is clear and unambiguous. No rigorous search for unexpressed intention is required. For example, the 1970 Clean Air Act Amendments provided a 90-day grace period for existing sources to bring their emissions of Hazardous Air Pollutants ("HAPs") to within prescribed limits. Pub. L. No. 91-604, § 4(a), 84 Stat. 1676, 1685-86 (1970) (enacting 42 U.S.C. § 7412); *see also* 116 Cong. Rec. 33115 (1970) (statement of Senator Prouty: "An innovative feature of the [1970] bill, in keeping with the urgency of the problem, is the establishment of definite deadlines.") Likewise, section 112, as revised by the 1990 Amendments, gives existing sources three years to comply with the Maximum Available Control Technology for air toxics. 42 U.S.C. § 7412(i)(3).

Instead of a definite time-measured mandate, a source triggers NSR when and if it undertakes activity that creates, *new*, heretofore unregulated, pollution.

Petitioners argue that the NSR program mandates some unspecified grandfathering that eventually forces all sources into NSR. This confuses an expectation—that some number of existing sources might eventually be replaced with new sources—with a statutory mandate ultimately compelling installation of advanced controls on all existing sources. Manifesting this confusion is Petitioners' misplaced reliance on a passage from the House report on the 1977 amendments quoting an industry representative's statement to the effect that "[p]roven FGD [flue gas desulfurization] systems are justified for new plants utilizing higher sulfur fuel where sizable emission reductions are needed to meet new source performance standards. * * * [I]t is imprudent to backfit FGD into existing plants, especially older units facing retirement within 10-15 years." Certainly Congress would

make such a significant policy decision in a more direct and explicit way.[8] Yet even a cursory examination of the quoted passage reveals that the "10-15 years" reference is not a limitation on the universe of existing plants for which backfitting FGD would be imprudent. It is simply a specific illustration—a subset of the universe of existing units for which such backfitting would be "especially" imprudent.

Such practical considerations aside, what this report actually says is that some Members of Congress may have expected that some existing power plants would be retired and new ones constructed. And this indeed has occurred. It certainly does not, however, indicate that Congress has adopted statutory language designed to compel this outcome. Building upon this misconstruction of the 1977 CAA Amendments' legislative history, Petitioners proceed to misconstrue further the relevant case law to bolster their argument. For example, Petitioners reinterpret the D.C. Circuit opinion in *Alabama Power v. Costle*, 636 F.2d 323, 400 (D.C. Cir. 1979)—which actually described the 1977 Clean Air Act Amendments as intending to "grandfather existing Industries," but not create a "perpetual immunity from all standards, under the PSD program"—from its long-

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[8] Current and former Members of Congress Waxman, Markey, Rooney, Maguire, Ottinger, Moffett and Anderson ("Waxman, et al. Amici") have filed an *amicus curiae* brief in this case. Amici Waxman, *et al.*, particularly elevate this remark (Amici Waxman, *et al.* Brief at p. 21) stating, "Congress's decision to allow these sources to continue operating without NSR controls was based on the expectation that many 'older units fac[e] retirement in 10-15 years,' meaning that they would have to be refurbished –and controlled—if they were to continue operating." Certainly Congressman Waxman appreciates the nature of estimates. See, *e.g.*, Cong. Waxman letter to Congressional leadership reminding that estimates offered to and/or relied upon by government are just that and can prove to be conservative (in the context of the Department of Homeland Security cost estimates), at http://www.democrats.reform.house.gov/Documents/20040827140714-65532.pdf.

understood meaning and scope to now stand for a proposition that the court never addressed, specifically, that increasing pollution for PSD purposes means something more than increasing the capacity of the facility to emit. In *Alabama Power*, no party challenged the provision of the 1978 PSD rules requiring an increase in the "potential emission rate" of a source for there to be a "modification." Thus, the *Alabama Power* court's explanation that "Congress wished to apply the permit process . . . only where industrial changes might increase pollution," and its related observation regarding "perpetual immunity," merely recognize that existing sources become subject to NSPS and PSD when they undertake section 111 modifications.

Similarly, statements by the Seventh Circuit in *Wisconsin Electric Power Co. v. Reilly*, expressing concern over opening "vistas of indefinite immunity from the provisions of NSPS and PSD," must be read in the context of the Circuit's rejection of Wisconsin Electric Power's argument that "massive" and "unprecedented" projects, enabling facilities to increase their hourly emitting *capacity* by up to 40 percent, were routine maintenance that failed to trigger NSR. 893 F.2d 901, 909-10 (7th Cir. 1990).

II. THE NEW SOURCE PROGRAMS MODIFICATION RULE APPLIES ONLY TO EXISTING SOURCE CHANGES THAT CREATE NEW AND UNREGULATED POLLUTION.

The definition of "modification," which is the trigger for every new source program in the Clean Air Act, reflects Congress' deliberate and fundamental policy distinction between regulation of new sources of pollution and existing sources of pollution. This understanding has been a central feature of the Clean Air Act since 1970.

A. The Modification Rule focuses on new emissions capacity.

The New Source Programs modification rule arises from the 1970 Clean Air Act Amendments and the NSPS program they created. At that time, Congress required review of "modification" for reconstruction as well as "construction" activities because both can create new capacity to emit. H.R. Rep. No. 91-1146, at 10 (1970) ("[N]ew sources may take the form either of entirely new facilities or expanded or modified facilities. . . ."). The Clean Air Act defines "modification" as any physical or operational change "which increases the amount of any air pollutant emitted by such source." 42 U.S.C. § 7411(a)(4). Accordingly, the "modification" definition from its inception focused on activity creating new (*i.e.*, unregulated) emissions, and until this enforcement was initiated, EPA never interpreted the term "modification" to the contrary.

It is inarguable from the text and structure of the 1977 Amendments that Congress carried over this NSPS meaning of "modification" to the NSR program. *See, e.g.*, 42 U.S.C. § 7501(4). The legislative history of the 1977 amendments confirms that Congress focused NSR on new emissions—not on the use or maintenance of existing facilities and their already-regulated emissions capacity. S. Rep. No. 95-127, at 55 (1977) (Congress determined that "some mechanism [was] needed to assure that before *new and expanded* facilities are permitted, a State demonstrate that these facilities can be accommodated within its overall plan to provide for attainment of air quality standards.") (emphasis added); *see* 123 Cong. Rec. 18,021 (1977) (Senator Muskie, one sponsor of the 1977 Clean Air Act Amendments, noted that the NSR procedures "apply only to new major emitting facilities and do not affect existing facilities"); S. Rep. No. 95-127, at 29 (1977); *see also* 123 Cong. Rec. 18,040 (1977) (statement of Senator Randolph) ("[T]he nondeterioration section [PSD]

applies only to major new emission sources. It does not relate to sources already in existence.").

As illustrated, *supra*, as part of the SIP process, States review and regulate emissions capacity from their resident sources. So long as the SIP assessment of the regulated emissions capacity of a source is not disturbed, air quality remains protected no matter how many hours the source operates or what physical changes are made to enable it to continue such operation. Congress specifically intended the term "modification" to encompass only activity that increases the capacity of a facility to emit—not the use of existing capacity as constructed and permitted, recognizing the redundancy inherent in reviewing these sources again unless the source is changed in a way that creates new, heretofore unregulated emissions. *See Puerto Rican Cement Co. v. EPA*, 889 F.2d 292, 298 (1st Cir. 1989) ("[T]he statute refers to the '*construction*' of facilities, not to *increased use of existing facilities*.").

B. NSPS and NSR are closely related programs sharing common features, including the same definition of "Modification."

1. *Congress deliberately defined NSR modification by reference to NSPS modification.*

Far from scrapping the NSPS model and beginning anew when crafting NSR, Congress instead modeled the statutory NSR program after EPA's 1974 regulatory PSD program, in which EPA defined "modification" precisely as in the NSPS program, emphasizing the Administrator's intent for "the definition of modification under Part 52 [addressing PSD] to be consistent with the final definition of this term under Part 60 [governing the NSPS program]." *See* 39 Fed. Reg. at 42,513 (Dec. 5, 1974).

In 1977, Congress codified the NSR program, incorporating the NSPS definition of modification into the NSR definition. *See, e.g.,* 42 U.S.C. §7501(4) ("The terms 'modifications' and 'modified' mean the same as the term 'modification' *as used in* section 7411(a)(4) of this title [the NSPS program].") (emphasis added).[9]

That Congress expressly incorporated the NSPS definition into the statutory NSR program is not simply a case in which two related programs, in the same Act, have identical words that should normally be given the same meaning. *See Sullivan v. Stroop,* 496 U.S. 478, 484 (1990). Here, Congress expected that NSR review would occur in conjunction with NSPS review and that the process would be much the same. H. Rep. No. 95-294, at 144-45 (1977). This was also a major concern for EPA when creating the regulatory PSD program. *See* Approval and Promulgation of Implementation Plans: Prevention of Significant Air Quality Deterioration, 39 Fed. Reg. 42,510, 42,512 (Dec. 5, 1974). Appropriately, EPA itself has recognized the close ties between the NSPS and NSR programs. 68 Fed. Reg. 61248, 61268 (Oct. 27, 2003) ("The NSR program's scope is closely related to the scope of the NSPS program."). In fact, given the explicit cross-

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[9] Congress codified EPA's regulatory program in the 1977 amendments with some alterations, for instance, strengthening the statutory NSR program's control technology requirements from those required by EPA in the regulatory program, reflecting the concern expressed at the time by Senator Muskie that there existed a "gap" between "actual best available technology and what has been required under new source performance standards." 123 Cong. Rec. 18,022. Senator Muskie's statement, that "the record to date under the [NSPS] approach has been disappointing," 123 Cong. Rec. 18,022 (June 8, 1977) (quoted in Pets. Br. 5), specifically referred to the difference in "control" technology between BACT and NSPS, not to the scope of applicability of NSPS or PSD to activities at existing facilities. *See id.*; *see also id.* at 18,018 (The new NNSR provisions "establish controls more stringent than the [pre-existing NNSR] ruling by EPA.").

incorporation between the PSD and NSPS definition, the *application* of NSPS and "major modification" review under NSR should be identical. *See IBP, Inc. v. Alvarez*, 126 S. Ct. 514, 523 (2005).

Here, Congress once again acted deliberately, incorporating by reference an existing term having a recognized, accepted meaning. Congress failed to qualify "mean the same as" with, for example, "but only for statutory purposes, not for regulatory implementation purposes." Such qualification is precisely what the court in *United States v. Cinergy Corp.*, No. 06-1224 (7th Cir. 2006) would read into the statute.

2. *NSPS and NSR share overlapping regulatory goals.*

Unable to find support for their position in the statutory language, Petitioners argue that the NSPS and PSD programs have fundamentally different purposes requiring that coverage of projects undertaken at existing facilities be broader under the PSD program than under the NSPS program. Specifically, they argue that because the PSD program is an "ambient-based" program, whereas NSPS is a "technology-based" program, preconstruction permit coverage must be coterminous with the activities that consume the PSD "increments." These claims are specious.

Petitioners' argument fundamentally ignores that, starting with the 1970 CAA, both technology requirements and ambient-based preconstruction review were triggered by NSPS "modification" activities. Specifically, under the 1970 Act, preconstruction review to ensure compliance with the NAAQS was triggered by NSPS "modification," 42 U.S.C. §§ 7410(a)(2)(D), (a)(4), that being activity that created new pollution. By contrast, preconstruction review was *not* triggered by existing emissions already reviewed and regulated under the SIP—like emissions resulting from increased

hours of operation or from switches to an alternate fuel that the source was designed to accommodate. In other words, like nearly everything else in the Clean Air Act regulatory scheme, the decision to exclude these changes from the definition of "modification" under the 1970 Act emerges as a deliberate decision in the context of a regulatory regime where SIPs regulate emissions from existing sources at full capacity to ensure attainment and maintenance of the NAAQS. Under this regime, because all pollution up to an NSPS "modification" would be fully accounted for in the SIP, variations in operation of existing capacity would not trigger preconstruction review (as EPA made clear in its early regulations defining modification for NSPS and PSD), while "new pollution" that had not been reviewed would have to undergo review to assure "attainment and maintenance" of NAAQS.[10]

Furthermore, arguments seeking to defeat Congress' instruction that "'modifications' and 'modified' mean the same as the term 'modification' *as used in* [the NSPS program]," by extrapolating different meanings between the terms through touting differing purposes of the PSD and NSPS programs, also ignore the fact that some activities that could cause NAAQS exceedances or consume the PSD "increment" are not, and have never been, regulated under the preconstruction permit programs. For instance, Petitioners suggest that because the "baseline" for increment consumption accounting purposes in PSD areas is based on an area's air quality, any activity that increases "actual emissions" and potentially affects the air quality must necessarily trigger PSD preconstruction review. Pets. Br. at 40-41. This is incorrect.

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[10] For such reasons, in its preamble of the 1980 Rules, EPA articulated disagreement with commenting parties that had argued the focus of NSPS was based solely on technology, explaining that "the decision to develop the NSPS is clearly based on ambient air quality concerns." 45 Fed. Reg. at 52,691-92 (Aug. 7, 1980).

Petitioners' view conflates "baseline" for purposes of increment accounting, which is the date of the first PSD permit application filed in a PSD area, *see* 42 U.S.C. § 7479(4) ("[t]he term 'baseline concentration] means, with respect to a pollutant, the ambient concentration levels which exist at the time of the first application for a permit in an area subject to this part"), with "baseline" for applicability purposes (*i.e.*, for determining whether a particular activity increased emissions and thus was a "modification"), which is a period shortly before the activity, see, *e.g.*, 40 C.F.R. § 52.21(d)(21)(ii) (establishing as a baseline date "a two-year period which precedes the particular date and which is representative of normal source operations'). These two dates can be separated by years—indeed, decades, for projects conducted in the late 1980s through 2000, as is the case here—and thus bear no relationship to each other.

Moreover, even where a correspondence between the two exists, Petitioners' argument proves too much. As recognized in *Alabama Power v. Costle*, a fuel switch to a higher-emitting fuel allowed under a facility's permit potentially consumes increment, but has always been excluded from PSD review. 636 F.2d at 378. In the court's own words, this argument "conflates the different yet complementary functions of [pre-construction] review and calculation of increment consumption." *Id.* EPA's longstanding definition of "modification" in both its NSPS and NSR programs has excluded from the definition increased hours of operation within permitted capacity. 40 C.F.R. §§ 51.166(b)(2)(iii); 60.14(e)(3). Yet, under Petitioners' reasoning *every* exclusion under the PSD rules (fuel switch, production rate, hours of operations, *etc.*) would be illegal, since every exclusion necessarily describes activity that potentially consumes incre-

ment but that is not subject to pre-construction review. This cannot be correct.[11]

Arguments about the ostensibly different purposes of the NSPS and PSD programs ignore the fact that, like the NSPS program, the PSD program is both technology-based and ambient-based. As discussed above, the 1970 Clean Air Act Amendments combined a technology-based NSPS program, *see* 42 U.S.C. § 7411, and an ambient, NAAQS-based "pre-construction" program, *see* 42 U.S.C. § 7410(a)(4), with the same trigger for projects at existing facilities—an NSPS "modification." Under the 1974 PSD program, a "technology-based" program requiring installation or the best available control technology ("BACT") and an "ambient-based" program designed to protect "PSD increments" in attainment areas were merged in one PSD program. In this program, the permits required that new emissions capacity comply with BACT, NAAQS and the PSD increment program.

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[11] EPA recognized as much, again in the 1980 Rules preamble, discussing how States can address this issue: First, noting that the increments must be protected separately from any pre-construction requirements, EPA explained that the State must periodically review air quality and take "corrective action" if the increments are exceeded. This is one of the aspects of the PSD programs that Congress specifically "tightened" in 1977. *See Alabama Power v. Costle*, 636 F.2d at 361-64. Under the 1974 PSD rules, there was no requirement (or authority) to take action to protect the increments if they are exceeded due to "non-modification" activity (*e.g.*, fuel switch). 45 Fed. Reg. at 52,677 (Aug. 7, 1980). Second, EPA explained that States could "revise SIPs and/or issue operating permits so that SIP requirements and permits reflect actual source operating conditions." *Id.* at 52,721-22. If the State does the latter—*i.e.*, revise a source's permit to limit hours of operations, as the example in the preamble posits, *see id.* at 52,705—any increase in hours in excess of an enforceable permit limit, whether made possible by maintenance work or not, would trigger PSD. If the permit does not restrict hours, however, there is no basis in the regulations, or in logic, to differentiate between the two types of increases in hours of operation of the existing unit.

CONCLUSION

Electric utility operations routinely fluctuate by the hour, day, month, and year. This is due to variable demand driven by many factors including the weather, economic health, and the availability of other units on the system. Utilities keep their units in good repair to respond to the market's fluctuations. They are issued permits that do not limit their operating hours, enabling them to meet these obligations.[12] To ensure that these fluctuating source-specific emissions do not interfere with attainment or maintenance of the NAAQS, State regulators at the technical air quality planning level issue permits to utility sources that either reflect a specific emission limit or assume round-the-clock operations, and translate the relevant pollution numbers into the overall States' attainment and maintenance plans.

At the more basic level, this approach to air quality planning reflects the fundamental distinction between existing source pollution, which is fully accounted for and subjected to a NAAQS compliance-driven level of control, and greenfield units and modified sources creating "new" pollution. The Clean Air Act's language and history make clear that the NSR and NSPS programs were always intended by Congress to address and apply to this *new* pollution (emissions from new sources). Old pollution (emissions from existing sources), no matter how it fluctuates within the universe of emissions generated by existing sources, is controlled by other (*i.e.*, non-NSR) Clean Air Act programs. In their pursuit of a major policy shift repeatedly rejected by Con-

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[12] EPA has consistently recognized that Congress did not intend to regulate such fluctuations. *See* 68 Fed. Reg. 61,253 (Oct. 27, 2003). ("[A]pplication of the major NSR program to 'modified' plants is [not] designed to require existing plants that are continuing to operate in a manner consistent with their original design to curtail their rate of production or hours of operation beyond limitations set forth in their existing permits."); *see also* 45 Fed.Reg. 52,704 (Aug. 7, 1980).

gress, Petitioners make "grace period" or "grandfathering" arguments and other similar claims that fundamentally misstate and misconstrue all of the major policy choices made by Congress throughout the entire life of the Clean Air Act.

In turn, the common definition of "modification," to be applied in the context of the NSR and NSPS programs, was developed in response to, and is driven both by these overarching regulatory policy imperatives and by Congress' decision to regulate old and new pollution in fundamentally different ways. Petitioners indicate that failure to adopt their desired policy shift will result in a policy hole in America's air pollution regulations. To the contrary, revising the definition "of modification" along the lines suggested by the Petitioners so as to apply NSR to the fluctuating emissions of already-regulated pollution would defeat Congressional intent and effectively emasculate the non-NSR Clean Air Act programs. The Court should refuse to indulge in such a fundamental re-write of one of this nation's most important and carefully balanced regulatory statutes.

Respectfully submitted,

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Petitioners,

v.

DUKE ENERGY CORP., *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF LAW PROFESSORS JOHN E. BONINE, OLIVER A. HOUCK, RICHARD J. LAZARUS, EDWARD LLOYD, THOMAS O. MCGARITY, ROBERT V. PERCIVAL, ZYGMUNT J.B. PLATER, ARNOLD W. REITZE, JR., WILLIAM H. RODGERS, PETER M. SHANE, AND MARK SQUILLACE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE[1]

Amici are professors of law who teach and write in the fields of environmental and administrative law. Amici have substantial expertise relevant to the questions of interpretation of the Clean Air Act law presented in this case, and strong professional interests in the development of legal rules that promote fidelity to the public policies established in the Clean Air Act.

John E. Bonine is a professor of law at the University of Oregon.[2] He is the former Associate General Counsel for Air, Noise, and Solid Waste at the United States Environmental Protection Agency, in which capacity he provided legal advice on all aspects of the Clean Air Act. His book (with Professor Thomas O. McGarity), *The Law of Environmental Protection* (2d ed. 1992), analyzed both the PSD program and other significant Clean Air Act programs. Professor Bonine has taught pollution law for 28 years.

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[1] The parties have consented to the filing of this brief. Letters of consent to the filing of this brief are being filed in conjunction with this brief. Pursuant to this Court's Rule 37.6, counsel states that this brief was not authored in whole or in part by counsel for a party and that no one other than amici and their counsel made a monetary contribution to the preparation or submission of this brief.

[2] Law school affiliations are included here for identification only and should not be construed as endorsement by the institutions of any positions asserted in this brief.

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STATEMENT

This case addresses the validity of the regulatory test adopted by the Environmental Protection Agency ("EPA") under the Clean Air Act for determining whether a change to a stationary source of air pollution constitutes a "modification" as that term is used in the Prevention of Significant Deterioration program ("PSD"), 42 U.S.C. §§ 7470-7492. The PSD program specifies standards for the "construction" of major pollution sources operating in attainment areas, that is, areas that comply with the Clean Air Act's national ambient air quality standards. 42 U.S.C. § 7475(a). The Act defines "construction" for the PSD program to include "modification" of existing sources, and defines "modification," in turn, by cross-reference to 42 U.S.C. § 7411. That provision, part of the New Source Performance Standards ("NSPS") program, defines "modification" as "any physical change in a stationary source which increases the amount of any air pollutant emitted by such source." 42 U.S.C. § 7411(a)(4). EPA promulgated regulations implementing the PSD program by establishing

an actual annual emissions test for measuring whether a change "increases" the amount of air pollution emitted and thereby constitutes a "modification." The test compares "actual emissions" from a source, measured in "tons per year," with past actual annual emissions. *See* 40 C.F.R. § 51.166(b)(2), (3), (21) (1987).

In this enforcement action, the Fourth Circuit refused to give effect to the actual annual emissions test on the ground that EPA has adopted a different test for measuring emissions increases under the NSPS program. The NSPS test measures emissions "increases" on the basis of hourly emission *rates*, expressed in kilograms of pollutants that a source is capable of emitting per hour, rather than total actual annual emissions. 40 C.F.R. § 60.14 (1988). The Fourth Circuit ruled that the text of the Clean Air Act establishes an "effectively irrebuttable" presumption that EPA must establish identical regulatory tests for measuring emissions increases under both the PSD and NSPS programs: "When Congress mandates that two provisions of a single statutory scheme define a term identically, the agency charged with administering the statutory scheme cannot interpret these identical definitions differently." *United States v. Duke Energy Corp.*, 411 F.3d 539, 546-547 (4th Cir. 2005).

Concluding that EPA must employ the same test for measuring emissions increases under both programs, the Fourth Circuit refused to apply the actual annual emissions test adopted under the PSD program because the NSPS test had been adopted first: "No one disputes that prior to enactment of the PSD statute, the EPA promulgated NSPS regulations that define the term 'modification' so that only a project that increases a plant's *hourly* rate of emissions constitutes a 'modification.' The EPA must, therefore, interpret its PSD

regulations defining 'modification' congruently." *Id.* (emphasis supplied by the court).

SUMMARY OF ARGUMENT

The court of appeals erred in effectively invalidating the actual annual emissions test. That test is fully supported, if not mandated, by the text of the "modification" definition. The actual annual emissions test measures whether there has been an "increase" in the "amount" of air pollutants "emitted," as the quoted words are used in 42 U.S.C. § 7411(a)(4), by comparing the total amount of pollution emitted per year to annual amounts emitted in past years. EPA reasonably concluded that pollution emissions can be said to increase if more pollution is emitted this year than in past years.

In ruling otherwise, the court of appeals did not follow basic principles of statutory construction. Although the court found that the text of the Clean Air Act does not allow the actual annual emissions test, the court did not examine the statutory text, history, or purposes of the Clean Air Act and the PSD provisions, and the court did not hold that the actual annual emissions test is in any way inconsistent with the Clean Air Act. The court likewise did not conclude that the "modification" definition unambiguously requires that "increases" be measured by the hourly rate test adopted under the NSPS program, making the actual annual emissions test in EPA's PSD regulations an impermissible agency interpretation under the framework of *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984). Nor is it possible that the court could have reached such conclusions.

Rather than undertaking any analysis that properly could be characterized as statutory construction, the Fourth Circuit invalidated the actual annual emissions test solely on the ground that EPA had adopted a different emissions test under the NSPS program. This Court's cases do not support that conclusion. This Court has stated that a presumption of consistent meanings arises when a term appears in more than one statutory provision, but this Court has long recognized that the presumption "is not rigid" and "readily yields" when application of ordinary principles of statutory construction reveals that the term should be construed differently in different statutory provisions. *Atlantic Cleaners & Dyers, Inc. v. United States,* 286 U.S. 427, 433 (1932).

The court of appeals mistakenly concluded that the presumption of consistency becomes "effectively irrebuttable" when a repeated term is defined in a single provision, but this Court has already unanimously rejected that argument. In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), this Court ruled that Congress's use of a single statutory definition for the term "employee" in Title VII does not mean that the term must be given an identical construction in every provision in which it appears. Even though Title VII includes a definition of "employee" applicable throughout the statute, this Court held that the term means past and present employees in some provisions but only present employees in other provisions. This Court's decision in *Rowan Cos. v. United States*, 452 U.S. 247 (1981), upon which the Fourth Circuit relied in finding the presumption of consistency "effectively irrebuttable," does not support such a beefed-up presumption. *Rowan* holds that the term "wages" should be given a consistent meaning in different provisions of the tax code based on the

text, purposes, and legislative history of the provisions at issue. *Rowan* does not hold that the presence of a common statutory definition invariably mandates consistency.

Even if the Fourth Circuit were correct that EPA must employ identical tests for determining if there has been an emissions "increase" under both the NSPS and PSD programs, that conclusion would not mean that the actual annual emissions test is invalid. That EPA adopted different tests under the two programs does not suggest which test is right or wrong. The Fourth Circuit gave no reason for preferring the hourly rate test over the actual annual emissions test other than the fact that the hourly rate test was adopted first. If consistency is required, however, there is no reason to prefer an earlier test to a later test. Instead, the validity of either test should be determined using the ordinary methods of statutory construction, examining the statutory text, context, purposes, and history of the Clean Air Act, and giving proper deference to EPA for its resolution of any statutory ambiguities. Under that analysis, the actual annual emissions test is plainly valid.

ARGUMENT

I. THE PLAIN MEANING OF THE "MODIFICATION" DEFINITION AND THE UNMISTAKABLE PURPOSE OF THE PSD PROGRAM REQUIRE AN ACTUAL ANNUAL EMISSIONS TEST

In reviewing the court of appeals' refusal to give effect to EPA regulations, it is important to note what the court did not do: it did not undertake to construe the definition of "modification" as it appears in 42 U.S.C. § 7411(a)(4),

and it did not conclude that the actual annual emissions test adopted by EPA for the PSD program is inconsistent with that text, or with the structure, purposes, or history of the Clean Air Act.

Had the court bothered to consider the text of the "modification" definition, it could only have reached the conclusion that the actual annual emission test is not only a permissible construction of that text but is in fact required by it. Section 7411(a)(4) defines "modification" of stationary sources subject to the PSD program as "any physical change in * * * a stationary source which increases the amount of any air pollutant emitted by such source." The ordinary meaning of the operative words—"amount," "emitted," and "increases"—comport with the actual annual emission test. Under the actual annual emissions test, the "amount" of air pollutants "emitted" is said to "increase" when a stationary source "emitted" more tons of pollutants this year than it did in past years. That test perfectly tracks the everyday meanings of the statutory terms, as the "amount" of pollution "emitted" surely "increases" when more tons of pollution are released now than in the past. It would be difficult to find a more obvious example of the plain meaning of common words.[3]

The alternative test, the hourly rate test, which measures the maximum amount of pollution a source can emit per hour, does not so easily conform with the statutory

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[3] *See Webster's Third New International Dictionary* 1145 (2002) (defining "increase" as "to become greater in some respect (as in size, quantity, number, degree, value, intensity, power, authority, reputation, wealth): GROW, ADVANCE, WAX"); *id.* at 72 (defining "amount" as "the total number or quantity: AGGREGATE"); *id.* at 742 (defining "emit" as "to send out: DISCHARGE, RELEASE").

language. Nothing in the text of the "modification" definition suggests any concern for maximum emission *rates* unconnected to actual pollution emitted. The definition makes clear that Congress was concerned about the "amount" of pollution "emitted," which does not necessarily depend on a source's capacity for emissions. On the one hand, a change to a source may increase its capacity for emissions without increasing the amount of pollution emitted if the source operates below its capacity. On the other hand, a change that allows a source to operate for more hours may increase the amount of pollution actually emitted even though its hourly emissions capacity stays the same or even decreases. Accordingly, a test that focuses on hourly emission rates does not capture Congress's intent to focus on changes that "increase" the "amount" pollutants actually "emitted."[4]

Although the Fourth Circuit did not undertake any analysis of the language of the "modification" definition, the D.C. Circuit thoroughly examined the statutory text and held that the actual annual emissions test is required by the plain language of the modification definition, ruling that "the Clean Air Act unambiguously defines 'increases' in terms of actual emissions." *New York v. EPA*, 413 F.3d 3, 39 (D.C. Cir. 2005). The court found that the phrase "the amount of any air pollutant emitted" in the "modification" definition "plainly refers to actual emissions." *Id.* at 40. The

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[4] The hourly rate test would not square with the statutory language even if it focused on the hourly rate of pollutants that a source actually emits, rather than its hourly emissions capacity. The "amount" of pollutants "emitted" from a source can "increase" if a source makes a change that allows it to operate more hours without increasing the hourly rate of emissions, but such a change would not be captured by any version of an hourly rate test.

court noted that other Clean Air Act provisions distinguish between actual, potential, and allowable emissions: "If Congress had intended for 'increases' in emissions to be measured in terms of potential or allowable emissions, it would have added a reference to 'potential to emit' or 'emission limitations.' The absence of such a reference must be given effect." *Id.* Accordingly, the court found that the "plain language" of the modification definition mandates that EPA examine "actual emissions instead of potential or allowable emissions." *Id.* Unlike the Fourth Circuit, the D.C. Circuit has authority to determine the validity of EPA regulations, a fact that provides an independent basis for reversal. *See* 42 U.S.C. § 7607(b).

To the extent that the validity of the actual annual emissions test is not fully resolved by the plain language of the "modification" definition alone, other provisions of the PSD program make it clear that the "modification" definition refers to actual emissions. The program applies to "major emitting sources," expressly defined in terms of their total annual emissions. *See* 42 U.S.C. § 7479(1). It would be incongruous to define a "modification" of these major sources in terms of anything but increases in annual emissions. The compliance provisions likewise speak in terms of limits on actual emissions, *see, e.g.*, 42 U.S.C. § 7475(a)(1), (3), making it exceedingly unlikely that Congress could have intended a threshold test to allow actual emissions increases to go unregulated.

Moreover, the purpose of the PSD program supports the actual annual emissions test but not the hourly rate test. The PSD program seeks to prevent increases in the emission of pollutants in attainment areas, that is, areas in compliance with ambient air quality standards. *See* 42 U.S.C. § 7470; *Ala. Power v. Costle*, 636 F.2d 323, 346-351

(D.C. Cir 1979). It does so, as the Fourth Circuit correctly stated, by "fix[ing] on the actual emissions from a site." 411 F.3d at 543; *see also Alaska Dept. of Environmental Conservation v. EPA*, 540 U.S. 461, 470-471 (2004). Congress declared that the PSD program is intended "to assure that any decision to permit increased air pollution in [attainment areas] is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation." 42 U.S.C. § 7470(5). Congress's goal of preventing increased pollution emissions without "careful evaluation" and "public participation" would be thwarted by the hourly rate test because it allows increased emissions without any agency evaluation or public participation.[5]

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[5] Moreover, if the court of appeals were correct that consistency requires that the hourly rate test be applied in identifying "modifications" in attainment areas under the PSD program, that would presumably mean that the same test must also be applied to "modifications" in non-attainment areas under the Non-Attainment New Source Review ("NNSR") program. As under the PSD provisions, the definition of "modification" for NNSR is incorporated by reference to the NSPS provision. *See* 42 U.S.C. § 7501(4). Application of the hourly rate test under NNSR would have disastrous consequences for air quality. The purpose of the NNSR program is to decrease the total amount of pollution emissions in non-attainment areas so that the national ambient air quality standards can be achieved, but that purpose would be thwarted if regulatory authorities must focus on hourly emission rates rather than actual annual emissions. Indeed, if EPA were stuck with the hourly rate test under the NNSR program, air pollution in non-attainment areas could get much worse and EPA could do little about it.

II. THE PRESUMPTION OF CONSISTENCY DOES NOT SUPPORT THE INVALIDATION OF THE ACTUAL ANNUAL EMISSIONS TEST

In refusing to apply the actual annual emissions test, the Fourth Circuit relied principally, if not entirely, on the presumption of consistency—the principle that a word appearing in different statutory provisions should be given a consistent meaning. This Court long ago warned, however, that "only mischief can result" if a term appearing in two statutory provisions must be "given one meaning regardless of the statutory context." *Lee v. Madigan*, 358 U.S. 228, 231 (1959). The Fourth Circuit's decision in this case reveals exactly the sort of mischief this Court meant. There is no basis in principles of statutory construction or in this Court's cases for concluding that EPA must employ the same test for emissions increases under the PSD and NSPS programs. Moreover, even if EPA must employ identical tests for both programs, that conclusion would in no way mean that the actual annual emissions test is invalid.

A. This Court Has Unanimously Rejected the Argument that a Term Must Be Construed Identically Whenever It Is Defined in a Single Statutory Provision

This Court has long recognized a presumption that a term be given a consistent meaning when it appears in different provisions of the same statute. *See, e.g., Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) ("[T]here is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning."); 2A Norman J. Singer, *Statutes and Statutory Construction* 357 (6th ed. 2000). The

presumption of consistency arises from the principle that "a phrase gathers meaning from the words around it." *General Dynamics Land Systems v. Cline*, 540 U.S. 585, 591 (2004). Thus, a "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear." *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988).

The Fourth Circuit applied the presumption, however, in a manner at odds with this Court's cases and oft-repeated instructions. The Fourth Circuit held that the presumption rigidly requires identical regulatory tests in different programs that make use of the same statutory term whenever Congress has given the term a single statutory definition. As this Court has long recognized, however, the presumption of consistency "is not rigid" and "readily yields" when statutory context reveals that a term should be construed differently in different statutory provisions. *Atlantic Cleaners & Dyers, Inc. v. United States,* 286 U.S. 427, 433 (1932). This Court's cases are replete with instances in which the presumption of consistency was rejected.[6] In a passage that this Court has

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[6] *See, e.g., Wachovia Bank v. Schmidt*, ___ U.S. ___, 126 S.Ct. 941 (2006) (holding that the word "located" as its appearances in the banking laws "is a chameleon word; its meaning depends on the context in and purpose for which it is used"); *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004) (holding that the word "age" has different meanings in different provisions of the Age Discrimination in Employment Act); *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200 (2001) (construing the phrase "wages paid" to have different meanings in different parts of the tax code); *Atlantic Cleaners & Dyers, Inc.* (holding that the word "trade" has a more encompassing meaning in Section 3 than in Section 1 of the Sherman Act).

declared that "[t]he tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against." *Cline*, 540 U.S. at 585 n.8 (quoting Cook, *"Substance" and "Procedure" in the Conflict of Laws*, 42 Yale L.J. 333, 337 (1933)).

Notwithstanding this Court's repeated instruction that the presumption of consistency must "readily yield" when statutory context supports a different result, the Fourth Circuit asserted that the presumption of consistency is "effectively irrebuttable" under the Clean Air Act because Congress defined the term "modification" for both PSD and NSPS in a single provision. As the Fourth Circuit stated: "Congress' decision to create identical statutory definitions of the term 'modification' has affirmatively mandated that this term be interpreted identically in the two programs." 411 F.3d at 550.

In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997), a case also arising from the Fourth Circuit, this Court unanimously rejected an argument identical to the one adopted by the court of appeals here, and ruled that Congress's use of a single statutory definition of a term does not mean that the term must be given an identical construction in every instance. *Robinson* addresses whether the term "employee" could include past and present employees in some provisions in Title VII but only present employees in other provisions. The Fourth Circuit had held that the term must be given identical meanings throughout the statute because Congress had given the word a single statutory definition. *See Robinson v. Shell Oil Co.*, 70 F.3d 325, 328-331 (4th Cir. 1995). As the court

of appeals stated, "employee" could only mean one thing throughout Title VII because "Title VII defines 'employee' for purposes of all provisions of Title VII." *Id.* at 329-330. This Court unanimously reversed, holding that the statutory definition of "employee" did not resolve the question because the definition "is consistent with either current or past employment." *Robinson*, 519 U.S. at 542. Finding that the term "employee" is ambiguous as to whether it is limited to current employees, this Court held that the ambiguity could be resolved differently in the different statutory provisions in which the term appears.

Robinson dictates reversal. *Robinson* demonstrates that a statutory term can be given different meanings as used in different provisions notwithstanding the fact that Congress gave the term a single statutory definition. Just as the term "employee" appears in various provisions in Title VII and is defined in a single statutory provision, so the term "modification" appears in both the NSPS and PSD provisions and is defined in a single statutory provision. Just as the definition of "employee" in Title VII does not resolve whether it covers both past and present employees, the definition of "modification" in the Clean Air Act does not resolve complex questions of how "increases" in air pollution emissions should be measured.[7] Thus,

[7] Under the Fourth Circuit's conclusion that identical regulatory tests for "modification" are required, it would appear that EPA could not, for reasons of technological feasibility or administrative convenience, choose to measure emissions increases by volume in one program and by weight in the other. The presumption of consistency, however, addresses only whether a term should be construed to have a consistent interpretation across statutory provisions and does not speak to the particulars of the regulatory tests by which an agency's interpretation is put into action.

while the Fourth Circuit held that Congress's decision to employ a single definition of "modification" applicable to both the NSPS and PSD program requires that the term be "interpreted identically," 411 F.3d at 550, *Robinson* holds that Congress's use of a single definition of "employee" does not require that the term be interpreted identically in every provision.

One difference between Title VII and the Clean Air Act bears special emphasis. Title VII does not delegate regulatory and thus interpretive authority to an administrative agency, but the Clean Air Act unquestionably gives EPA authority to promulgate regulations establishing exactly how emissions "increases" should be measured. As the D.C. Circuit correctly ruled, judicial review of the validity of EPA regulations like those embodying the actual emissions test must "apply a highly deferential standard of review," under which the regulations can be set aside only if it "exceeds EPA's statutory jurisdiction, authority, or limitations or is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *New York v. EPA*, 413 F.3d at 17 (quoting 42 U.S.C. § 7607(d)(9)). For the reasons discussed in Part I, *supra*, EPA's decision to employ an actual annual emissions test for the PSD program is eminently reasonable and is entitled to deference.

B. *Rowan* Does Not Support the Fourth Circuit's Decision

The Fourth Circuit placed particular reliance on this Court's decision in *Rowan Cos. v. United States*, 452 U.S. 247 (1981), which it characterized as addressing "a situation strikingly similar to the one at hand," 411 F.3d at 547.

Rowan, however, supports neither the "effectively irrebuttable" presumption of consistency adopted by the court of appeals nor the court's rejection of the actual annual emission test.

Rowan addresses the validity of Treasury Department regulations construing the meaning of the word "wages" as it appears in the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA), and the income tax withholding provisions of the tax code. The Treasury Department had adopted regulations requiring employers to include employer-provided meals and lodging in computing "wages" under FICA and FUTA but not in calculating "wages" for income tax withholding purposes. This Court held that the various tax code provisions were best construed to employ a single meaning of "wages." In holding that a consistent meaning of "wages" is required by the tax code, *Rowan* does not employ anything like the principle adopted by the Fourth Circuit—that the use of a single statutory definition establishes an "effectively irrebuttable" presumption that an agency must employ identical regulatory tests.

Instead, employing ordinary principles of statutory construction, *Rowan* holds that Congress intended the Treasury Department to employ a consistent interpretation of "wages." This Court carefully examined the text, purposes, legislative history, and regulatory history of the provisions at issue, and concluded that, read together, these sources demonstrate a congressional intent that the Treasury Department construe the term "wages" consistently. The Court supported its conclusion with the texts of the three statutes, which define "wages" in "substantially the same language." 452 U.S. at 255. The fact that Congress employed nearly identical definitions of wages in the

different statutes was not the end of this Court's analysis but rather only the beginning, as the similarity provided "strong evidence that Congress intended 'wages' to mean the same thing" in each statute. *Id.* Other sources relied upon in *Rowan* supported the conclusion that consistent meanings were intended. This Court thus relied on the legislative history and purposes of the tax code provisions at issue, finding that these sources "reveal a congressional concern for 'the interest of simplicity and ease of administration.'" 452 U.S. at 255 (quoting S.Rep. No. 1631, 77th Cong., 2d Sess., 165 (1942)). Congress's interest in simplicity and ease of administration would be jeopardized, this Court reasoned, if employers were required to calculate wages differently in different tax programs. *Id.* at 257.[8]

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[8] *Rowan* suggests that the Treasury Department was entitled to diminished deference for regulations interpreting the term "wages" because those regulations amounted to interpretive regulations adopted pursuant to a general grant of rulemaking authority. *See Rowan*, 452 U.S. at 251 ("[W]e owe the interpretation less deference than a regulation issued under a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision."). That aspect of *Rowan* may no longer be good law. As Justice Scalia has explained, the era in which this Court distinguished the degree of deference owed to agency statutory constructions based on whether the construction is embodied in "interpretive" rather than "legislative" regulations or whether the agency's rulemaking authority is general or specific "came to an end with our watershed decision in *Chevron*, which established the principle that 'a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.'" *Christensen v. Harris County*, 529 U.S. 576, 589 (2000) (Scalia, J., concurring) (quoting *Chevron*, 467 U.S. at 844). If the term "modification" is ambiguous (and the D.C. Circuit concluded that it unambiguously refers to actual emissions), EPA is entitled to the full measure of deference under *Chevron* for its construction of the term and, correspondingly, it has authority to determine whether differences between the NSPS and PSD programs require different tests for measuring modifications.

Rowan does not lend any support to the creation of an "effectively irrebuttable" presumption of consistency whenever Congress enacts a single definition of a term appearing throughout a statute. On the contrary, *Rowan* is an unremarkable application of the presumption of consistency. In *Rowan*, this Court found that the text, purposes, and legislative history of the tax provisions established no basis for departing from consistency and, in fact, affirmatively demonstrated a congressional intent that the term be construed consistently.

The considerations supporting this Court's conclusion in *Rowan* are absent here. There is no basis in the statutory text, legislative history, or purposes of the PSD and NSPS programs to conclude that Congress intended the two programs to be governed by identical regulatory tests without regard to any differences in the programs. There is no reason to conclude that, in incorporating the NSPS definition of modification in the PSD program, Congress was concerned about simplicity and ease of administration as it was in enacting the provisions of the tax code at issue in *Rowan*. Of course, simplicity and ease of administration are salutary in any program, but in *Rowan* this Court identified a specific reason for finding a congressional intent that the tax code provisions be easily understood: the provisions were intended to be applied by practically every employer in the United States and therefore concerns for simplicity and ease of administration were paramount. The Clean Air Act's PSD program, in contrast, only applies to major sources of air pollution, which are quite capable of adjusting to different tests in different circumstances. *Cf. Chevron*, 467 U.S. at 848 (characterizing the Clean Air Act as "lengthy, detailed, technical, complex, and comprehensive").

As the Fourth Circuit and other courts have recognized, there are fundamental differences between the PSD and NSPS programs. Thus, if the plain meaning of the modification definition does not require the actual annual emission test for both programs, differences between the PSD and NSPS programs could support different emissions tests. The NSPS program focuses on uniform technology-based performance standards, which apply to all new and modified sources in particular source categories regardless of where they are located. *See* 42 U.S.C. § 7411. The PSD program, in contrast, as the Fourth Circuit recognized, "fixes on the actual emissions from a site." 411 F.3d at 543; *see also N. Plains Res. Council v. EPA*, 645 F.2d 1349, 1356 (9th Cir. 1981) ("The NSPS program is * * * equipment oriented. On the other hand, the PSD program [is] site oriented.").

C. The Actual Annual Emissions Test Would Be Valid Even if EPA Were Required to Employ the Same Test for the NSPS and PSD Programs

Having mistakenly ruled that EPA is required to employ the same test for measuring emissions increases under both the PSD and NSPS programs, the Fourth Circuit compounded its mistake by ruling that inconsistency alone provides a ground for invalidating the actual annual emissions test. Even if the Fourth Circuit were correct that EPA must adopt identical emissions tests under the two programs, it would not mean that the actual annual emissions test is invalid. Consistency could be established in any of three ways: the actual annual emissions test could be required for both the PSD and NSPS programs, the hourly rate test could be required for both

programs, or some other test could be required for both programs. The conclusion that identical tests must be adopted for both the NSPS and PSD programs, even if it were correct, says nothing about what test is valid.

The presumption of consistency can require invalidation of a statutory interpretation only in circumstances not present here: when it is clear how a statutory term should be construed in one provision and an inconsistent construction of the term has been given to the term appearing in another provision. For instance, in *Cohen v. de la Cruz*, 523 U.S. 213 (1998), this Court examined the meaning of the phrase "debt for" as it appeared in Section 532(a)(2)(A) of the bankruptcy code. In *Cohen*, the Court first found that the term was used for identical purposes in various bankruptcy provisions, and the Court therefore concluded that the term should be given the same meaning in each provision. *Id.* at 220. Next, the Court found that the term had a clear meaning as it was used in one provision, Section 532(a)(9). *Id.* Finally, the Court reasoned that the clear meaning of the term as it appeared in Section 532(a)(9) should be imported into the provision at issue. *Id.* ("It is clear that 'debt for' in [Section 532(a)(9)] means 'debt arising from' or 'debt on account of,' and it follows that 'debt for' has the same meaning in § 523(a)(2)(A)."). To put this reasoning in generic terms, a court can invalidate an agency's statutory construction for violating the presumption of consistency if it finds that a term appearing in Provisions 1 and 2 must be construed consistently, finds that the term appearing in Provision 1 clearly has meaning X, and then finds that the term appearing in Provision 2 should also be given meaning X. But where there is no authoritative basis for determining what the term means in either Provision 1 or 2, inconsistent constructions

establish no basis for invalidating the agency's construction.

The Fourth Circuit did not adhere to this reasoning. It did not hold that Congress mandated an hourly rate test for either the NSPS or PSD program. The only reason it gave for preferring one test to the other is that the hourly rate test was adopted first: "No one disputes that prior to enactment of the PSD statute, the EPA promulgated NSPS regulations that define the term 'modification' so that only a project that increases a plant's *hourly* rate of emissions constitutes a 'modification.' The EPA must, therefore, interpret its PSD regulations defining 'modification' congruently." 411 F.3d at 550. As the D.C. Circuit held, however, there is no basis for finding that Congress intended to incorporate the regulatory hourly rate test in enacting the PSD provisions. *See New York v. EPA*, 413 F.3d at 19-20. Indeed, the Fourth Circuit appears to have recognized that the hourly rate test is not mandated by the text of the statute, as the court recognized EPA's authority to adopt a different test. 411 F.3d at 550. ("Of course, this does not mean that this regulatory interpretation must be retained indefinitely. The EPA retains its authority to amend and revise this and other regulations."). Thus, the only basis the court of appeals gave for finding that the PSD program must apply the hourly rate test rather than the actual annual emissions test is that the hourly rate test came first in time. That conclusion is unsupported by law or logic, and the court provided none.

CONCLUSION

For the foregoing reasons, as well those in the briefs filed by petitioners and their amici, the judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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Supreme Court of the United States

ENVIRONMENTAL DEFENSE, *et al.*,

Petitioners,

v.

DUKE ENERGY CORPORATION,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF FORMER EPA ADMINISTRATORS CAROL M. BROWNER AND RUSSELL E. TRAIN AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae[2] are a bipartisan team of former Environmental Protection Agency ("EPA") Administrators, spanning over a decade of service, with an interest in the uniform and consistent application of the Clean Air Act's ("Act") New Source Review ("NSR") program to regulated entities across the country. This case is not just about an enforcement action against a single regulated entity. Sanctioning the Fourth's Circuit's decision to invalidate long-standing EPA regulations would undermine Congress' intent to have prompt judicial review of nationally applicable regulations in a single court. As the agency primarily charged with implementing the Act, EPA has worked diligently over the last three and one half decades to appropriately and efficiently promulgate final rules on which EPA and the states could base state implementation plans, permits for regulated entities, and enforcement actions. *Ad hoc* review of final rules by the lower courts would undermine EPA's ability to carry out these important functions that protect our Nation's air. In addition, *amici* have a strong interest in ensuring that long-standing consistent interpretations of EPA rules are upheld by the courts.

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[1] All parties have consented to the filing of this brief in letters that are on file with the Clerk. Pursuant to Rule 37.6, counsel for *amici* state that no counsel for a party authored this brief in whole or in part. The Energy Foundation made a monetary contribution to cover the costs of printing the brief.

[2] *Amici* are Former EPA Administrator Carol M. Browner (Jan. 1993 to Jan. 2001) and Former EPA Administrator Russell E. Train (Sept. 1973 to Jan. 1977).

SUMMARY OF THE ARGUMENT

When the Clean Air Act was enacted in 1970, and amended in 1977, Congress was careful to include particularized judicial review provisions that streamlined and forced prompt challenges to nationally applicable regulations. *See* 42 U.S.C. § 7607(b). Section 307 of the Act allows only the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") (and, on appeal, the Supreme Court) to make decisions regarding the validity of such regulations. Congress recognized that if other circuit and district courts across the country were allowed to invalidate these regulations at any point in time, it would substantially interfere with EPA's ability to carry out the directives of the Act. Therefore, the Fourth Circuit can only interpret EPA's regulations; it cannot invalidate or effectively re-write EPA's regulations as it did in this case. The Fourth Circuit has overstepped its jurisdictional bounds in this case and the decision must be reversed.

In the alternative, even if the Fourth Circuit had jurisdiction, its alleged interpretation of the regulations is improper as it runs counter to EPA's long-standing consistent interpretation of the regulations. The Act, as amended in 1977, requires any major source (i.e., a source that emits above certain thresholds), to obtain a permit prior to undertaking a "modification," defined in the Act as any physical or operational change that "increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4). In this case, the Clean Air Act programs at issue are the New Source Performance Standards ("NSPS") and Prevention of Significant Deterioration ("PSD"). The NSPS program applies location-neutral, general emissions rate limitations to categories of

sources, while the PSD program requires case-by-case facility-wide emissions control technologies based on ambient air quality at the location of the source. Due to these fundamental differences in the programs, EPA has consistently used different rules for imposing the requirements of each program on regulated entities. While EPA interprets its NSPS rules to define "modification" as a physical or operational change that will increase a source's maximum hourly emissions rate, the plain language of the PSD rules establish an actual annual emissions test. Since 1980, EPA has consistently applied an actual annual emissions test, which includes the facility's number of hours of operation. Industry, including Respondent Duke Energy, was well aware of that test. The Fourth Circuit's decision should be reversed and remanded to carry out EPA's enforcement action and apply the actual annual emissions test to the facts of this case.

ARGUMENT

I. SECTION 307 OF THE CLEAN AIR ACT REQUIRES JUDICIAL REVIEW OF NATIONALLY APPLICABLE REGULATIONS TO OCCUR SOLELY IN THE DISTRICT OF COLUMBIA CIRCUIT COURT.

Although this case began as an enforcement action against Duke Energy for modifying its electric generating plants without applying for required permits or installing up-to-date pollution controls, it has turned into a platform for industry to entice the Fourth Circuit into improperly invalidating nationally applicable regulations that were promulgated over 25 years ago. The job of the lower courts was to apply EPA's regulations to the facts and to determine if Duke violated those regulations. Instead, under

the guise of interpreting the regulations, the Fourth Circuit has, in effect, improperly invalidated EPA's long-standing PSD regulations. Affirming the Fourth Circuit's decision would allow regulated entities to belatedly attack long-standing rules rather than promptly challenging disputed rules, thereby significantly disrupting EPA's ability to carry out the Clean Air Act's directive "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare." 42 U.S.C. § 7401(b)(1).

A. Rather than Applying the Regulations to the Facts to Determine if Enforcement Was Warranted, the Fourth Circuit Improperly Invalidated the 1980 PSD Regulations.

Section 307 of the Clean Air Act provides that "[a] petition for review of action of the Administrator in promulgating . . . nationally applicable regulations . . . may be filed only in the United States Court of Appeals for the District of Columbia. . . . Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation . . . appears in the Federal Register." 42 U.S.C. § 7607(b)(1). In addition, section 307 provides that challenges to nationally applicable regulations shall not occur in civil enforcement proceedings. 42 U.S.C. § 7607(b)(2). The purpose of the section 307 judicial review provision is "to avoid needless delays in the implementation of important national programs caused by incessant litigation and inconsistent decisions . . . [and] to ensure uniformity in decisions concerning issues of more than purely local or regional impact." *Lubrizol Corp. v. Train*, 547 F.2d 310, 315 (6th Cir. 1976) (internal citations omitted). Rather than promoting uniformity, the Fourth

Circuit's decision flies in the face of the purposes of streamlined judicial review for nationally applicable regulations.

The Clean Air Act requires modified sources to comply with New Source Performance Standards ("NSPS") and Prevention of Significant Deterioration ("PSD") requirements by, *inter alia*, installing emissions control technologies. 42 U.S.C. §§ 7411, 7470 *et seq.* Under the Act, "modification" is defined as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4). Although in the Act itself the broad definition of modification is identical for NSPS and PSD, the regulations for these provisions are different in order to account for the different purposes of the programs. "The focus of the NSPS program . . . [is] the particular apparatus to which a standard is applied. The NSPS program is therefore equipment oriented. On the other hand, the PSD program covers the whole stationary source, and focuses on where the plant will be located and its potential effect on its environs. The PSD program is therefore site oriented." *Northern Plains Resource Council v. EPA*, 645 F.2d 1349, 1356 (9th Cir. 1981) (internal citations omitted). Given the differing purposes of the programs, EPA promulgated regulations establishing an hourly emissions test for determining whether a physical or operational change constitutes a "modification" under the NSPS program, while establishing an annual emissions test for the PSD program. 40 C.F.R. § 60.14 (NSPS); 40 C.F.R. § 51.166(b)(21)(ii) (PSD). *See also New York v. Environmental Protection Agency*, 413 F.3d 3, 18 (D.C. Cir. 2005) ("*New York I*"); *Wisconsin Electric*

Power Company v. Reilly, 893 F.2d 901, 905 (7th Cir. 1990) ("*WEPCO*"); *United States v. Ohio Edison Co.*, 276 F. Supp. 2d 829, 862 (S.D. Ohio 2003); *United States v. Southern Indiana Gas and Electric Co.*, 245 F. Supp. 2d 994, 998 (S.D. Ind. 2003) ("SIGECO").

In EPA's PSD enforcement action against Duke Energy, the Fourth Circuit's role is to apply the "modification" test specified in EPA's PSD regulations and determine if the company's plant renovations triggered PSD requirements. Yet, completely disregarding section 307's clear requirements, the Fourth Circuit announced that "the language and various interpretations of the PSD regulations, on which the district court partially based its holding and which the parties exhaustively discuss, are largely irrelevant to the proper analysis of this case." *United States v. Duke Energy*, 411 F.3d 539, 547 n.3 (4th Cir. 2005). Instead of interpreting and applying EPA's regulations, the Fourth Circuit focused exclusively on ascertaining what it thought the statute requires, and based on that statutory reading, announced that the PSD program must apply the same test as in the NSPS regulations for determining when a "modification" occurs. *See id.* at 550. ("Congress' decision to create identical statutory definitions of the term 'modification' has affirmatively mandated that this term be interpreted identically for the two programs."). Without making any attempt to explain how EPA's PSD regulations could be read to establish an hourly emissions rate test, the court declared that the PSD test must turn on hourly emissions because "[n]o one disputes that prior to enactment of the PSD statute, the EPA promulgated NSPS regulations that define the term 'modification' so that only a project that increases a plant's

hourly rate of emissions constitutes a 'modification.'" *Id.* at 550 (emphasis in original).

The Fourth Circuit tries to explain away the section 307 requirements by stating that "[o]ur choice of this interpretation of the PSD regulations – as required under the statute – over the EPA's interpretation is not an invalidation of those regulations." *Id.* at 549 n.7. But the Fourth Circuit did not interpret the regulations; if it did, it would have no choice but to conclude that the PSD regulations define modification in terms of whether a physical or operational change will result in an annual emissions increase, taking into account increased hours of operation enabled by the change.[3] To the contrary, the Fourth Circuit ignored the PSD regulations and substituted its own test based on its reading of the statute – something it has no jurisdiction to do. *See Adamo Wrecking v. United States*, 434 U.S. 275, 284 (1978) (The district court is not in violation of section 307 because it "did not presume to judge the wisdom of the regulation"). *See also WEPCO*, 893 F.2d at 914 n.6 ("As a preliminary matter, we note that WEPCO has not asked us to review the propriety of the NSPS regulations themselves. Indeed, we have no such jurisdiction to conduct such an inquiry: 42 U.S.C. section 7607(b)(1) reserves such questions for the [DC Circuit]. . . . WEPCO simply requests that we consider whether the EPA properly applied these regulations to the . . . generating units. We have jurisdiction to undertake such an inquiry."); *United States v. Ho*, 311 F.3d 589, 607 (5th Cir. 2002); *Puerto Rican Cement Co. v. Environmental Protection Agency*, 889 F.2d 292, 299 (1st Cir. 1989).

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[3] *See infra* pp. 14-15 for further discussion of the plain language of the PSD regulations.

Duke is well aware that a challenge to the validity of nationally applicable regulations must occur in the D.C. Circuit; indeed, a host of industry petitioners, including Duke, challenged various provisions of the 1980 regulations directly in the D.C. Circuit shortly after those regulations were promulgated. *See Chemical Manufacturers Ass'n v. Environmental Protection Agency*, Nos. 79-1112 *et al.* That case was stayed several times and was recently revived and consolidated with additional challenges to EPA's 2002 rules in *New York I*. 413 F.3d at 3. In *New York I*, after stating that the "Industry petitioners also challenge the 1980 rule's definition of modification in the NSR[4] context to the extent that it differs from the NSPS definition," the court held, "[w]e are not convinced." *Id.* at 18. The D.C. Circuit found no indication in the statute or legislative history that Congress intended to incorporate the definition of "modification" in the NSPS regulations into the PSD program. *Id.* at 19. Further, the court noted that the NSPS regulations in place as of the 1977 Act amendments "used two different (and possibly inconsistent) definitions of modification," and that "[g]iven the two quite differently worded regulatory definitions of 'modification' *within* the NSPS program at the time of the 1977 amendments, it would take a rather pointed indication from Congress to support the idea that it expressly adopted one of them for NSR. No such indication exists."[5]

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[4] NSR or New Source Review is the overarching program that includes PSD review, for areas in attainment with the National Ambient Air Quality Standards ("NAAQS"), and Nonattainment New Source Review, for areas that are not in attainment with the NAAQS. This case concerns only PSD as the areas where Duke's plants are located are in attainment for the NAAQS.

[5] In *New York I*, the D.C. Circuit rejected industry's congressional incorporation argument – that when Congress amended the Clean Air

(Continued on following page)

Id. at 19-20 (emphasis in original). In sum, just as directed by section 307, Duke challenged the validity of EPA's PSD regulations in the D.C. Circuit. After failing in that challenge, Duke cannot have a second bite at the apple in this case.

B. Uniform Judicial Review of Nationally Applicable Regulations Is Critical to EPA's Ability to Properly Carry Out the Directives of the Clean Air Act.

This case provides a prime example for why assurance that "the substantive provisions of . . . [regulations are] uniformly applied and interpreted and that the circumstances of . . . adoption [should] be quickly reviewed by a single court" is of critical importance to EPA's ability to implement the Act. *Adamo Wrecking*, 434 U.S. at 284; *United States v. Ethyl Corp.*, 761 F.2d 1153, 1156 n.7, 1157 (5th Cir. 1985). Following the enactment of the Clean Air Act in 1970, EPA was tasked with establishing National Ambient Air Quality Standards ("NAAQS"), by "identify[ing] the maximum airborne concentration of a pollutant that the public health can tolerate, decreas[ing] the concentration to provide an 'adequate' margin of safety, and set[ting] the standard at that level." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 465 (2001). The

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Act in 1977 and added the PSD program Congress intended to incorporate the existing NSPS regulations into the PSD program. 413 F.3d at 20. As to the slightly different argument Duke attempts to make here, the court stated "[w]e express no opinion as to whether Congress intended to require that EPA use identical regulatory definitions of modification across the NSPS and NSR programs. That argument was not made by industry petitioners in their opening brief and is therefore waived." *Id.* (internal citations omitted).

PSD program is crucial to the Act because it "[s]eek[s] to prevent backsliding in regions whose air quality [meets the] NAAQS [by requiring] sources undertaking modifications to obtain preconstruction permits." *New York I*, 413 F.3d at 12. Without uniform, national regulations for the PSD program, EPA's ability to approve state implementation plans ("SIPs"), to write permits and to bring appropriate enforcement actions will be significantly disrupted.

First, the stability and effectiveness of SIPs – which lie at the core of delegated state enforcement actions – would be undermined if the Fourth Circuit's decision is allowed to stand. The Act requires EPA to approve SIPs, designed by and for each individual state, provided that the SIPs "include a program to provide for the . . . regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that the national ambient air quality standards are achieved, including a permit program." 42 U.S.C. § 7410(a)(2)(C). If the lower courts can invalidate the PSD regulations at any time, thereby potentially forcing EPA to redraft the regulations time and again, EPA (and the states[6]) could never be certain that the SIPs will actually contain the appropriate requirements to limit emissions and achieve the NAAQS. The states would, in essence, be required to revisit and revise the SIPs every time the regulations were invalidated and rewritten. 40 C.F.R. §§ 51.166(a)(3), (4). Since development and adoption of the regulations is an incredibly costly and time consuming endeavor, the SIPs would likely be left in limbo for lengthy

[6] *See* State of New Jersey's *amicus* brief for further discussion of the importance of uniform PSD regulations in conjunction with the states' ability to formulate adequate SIPs.

periods of time.[7] Section 307 was added to the Act precisely to prevent such an inefficient scenario. *See Adamo Wrecking*, 434 U.S. at 284. *See also Lubrizol Corp.*, 547 F.2d at 315, 317.

In addition, without uniform and final PSD regulations, the preconstruction permits will be written under a veil of uncertainty for both EPA and industry. The PSD program was established "to assure that any decision to permit increased air pollution in any area . . . is made only after careful evaluation of all the consequences of such a decision." 42 U.S.C. § 7470(5). To carry out this goal, the Act provides that "[n]o major emitting facility . . . may be constructed [or modified] in an area [that has attained the NAAQS] unless . . . the required analysis has been conducted in accordance with regulations promulgated by the Administrator." 42 U.S.C. §§ 7475(a)(2), 7479(2)(c). Such regulations must "assur[e] that maximum allowable increases . . . [of pollutants] shall not be exceeded." 42 U.S.C. § 7473(a). EPA and the states, when issuing permits, bear the responsibility of ensuring that modifications to existing sources do not "cause, or contribute to, air pollution in excess of" these thresholds. 42 U.S.C. § 7475(a)(3).

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[7] For example, when the 1978 PSD regulations were successfully challenged in *Alabama Power* under section 307 in the D.C. Circuit, it took EPA two years (until August, 1980) to issue amended regulations. *See Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1980). *See also* 43 Fed. Reg. 26,380 (June 19, 1978); 45 Fed. Reg. 52,676 (Aug. 7, 1980). When EPA's 1997 rules for ozone NAAQS were successfully challenged under section 307 in the D.C. Circuit (and then appealed to this Court), it took EPA seven years (until April, 2004) to issue amended regulations. *See American Trucking Ass'ns*, 531 U.S. 457. *See also* 62 Fed. Reg. 38,856 (July 18, 1997); 69 Fed. Reg. 23,951 (April 30, 2004).

The potential for changing regulations would create competitive disparity across industry if some facilities are permitted under old regulations, while others are permitted under new regulations.[8] EPA should not be tasked with the prospect of redrafting industry permits throughout the life of the regulations in response to industry challenges to the regulations. Such a scenario will provide incentive for regulated entities to challenge regulations any time they are unhappy with their permit or are targeted in an enforcement action. Although EPA is certainly able to revisit regulations on its own, due to changed circumstance or otherwise, any revisions to the regulations would be subject to notice and comment rulemaking, not the unilateral decision of a lower court judge.

Finally, the Clean Air Act's enforcement scheme would break down in the face of an affirmation of the Fourth Circuit's decision. "The process [for completing a new source review case] can take years due to: the size of utilities; the amount and complexity of historical information involved; the type of utility expertise needed to effectively develop an NSR case; and the limited EPA, State, and local agency enforcement resources." *New Source Review Rule Change Harms EPA's Ability to Enforce Against Coal-fired Electric Utilities*, Office of Inspector General, Report No. 2004-P-00034, Sept. 30, 2004, pp. 22-23 (*available at* http://www.epa.gov/oig/reports/2004/20040930-2004-P-00034.pdf). *See also Air Pollution: EPA Should Improve Oversight of Emissions Reporting at Large*

[8] EPA believes that the Fourth Circuit's "holding creates a potential disparity in the way we interpret the program in States in the Fourth Circuit compared to States in other Circuits in the country." 70 Fed. Reg. 61,081, 61,083 (Oct. 20, 2005).

Facilities, Government Accounting Office, April 2001, pp. 10-11 (*available at* http://www.gao.gov/new.items/d0146.pdf). EPA will usually begin by submitting a section 114 request for documents to the regulated entity and can spend years reviewing these documents before attempting settlement, filing its own administrative complaint or referring the case to the Department of Justice for enforcement. *See id. See also* 42 U.S.C. § 7413(a)(1); 42 U.S.C. § 7414. Discovery in this case alone "produced approximately 4.6 million pages of documents . . . [and] lengthy briefs [were] accompanied by thousands of pages of exhibits." *United States v. Duke Energy*, 278 F. Supp. 2d 619, 622 (M.D.N.C. 2003). If EPA has to change course in the middle of building an enforcement case in response to the invalidation of its own regulations, enforcement actions will become overwhelmingly inefficient, and in some circumstances enforcement will simply fall away. Such a scenario is not what Congress envisioned when the Clean Air Act was enacted.

II. EVEN IF THE FOURTH CIRCUIT HAD JURISDICTION, ITS REGULATORY INTERPRETATION DISREGARDS THE PLAIN LANGUAGE OF THE PSD REGULATIONS AND VIOLATES THE ACT.

Industry's hourly emissions test for triggering PSD requirements is contrary to the purposes of the Act, EPA's consistent PSD regulations, and related case law. The plain language of the PSD regulations clearly provide for an actual annual emissions test taking into account increased hours of operation enabled by a change at a facility. In addition, only an annual emissions test will fulfill the purposes of the PSD program to prevent backsliding in regions where the air quality is adequate. And

the fact that industry, including Duke, and EPA entered into a settlement agreement that required EPA to propose an hourly test after the applicable 1980 PSD regulations were finalized provides further proof that an hourly test does not apply to this case. Since an hourly test does not capture total actual annual emissions increases from a source, such a test simply cannot be sanctioned.

A. Industry's Hourly Test Is Contrary to the Plain Language of EPA's PSD Regulations.

Contrary to the Fourth Circuit's decision, EPA's PSD regulations unmistakably require an annual test, not an hourly test, for calculating an emissions increase that will trigger the PSD permitting requirements. The Act requires the owner or operator of a major stationary source to obtain a permit before undertaking a "modification," which the Act defines as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4). The regulations clarify that PSD requirements are triggered only for "major" modifications. 40 C.F.R. § 51.166(i)(2). A major modification occurs where a "physical change . . . would result in a significant net emissions increase." 40 C.F.R. § 51.166(b)(2)(i). A significant net emissions increase can be broken into a four-part test:

> 1. Emissions increase: "[a]ny increase in *actual emissions* from a particular physical change or change in the method of operation at a stationary source." 40 C.F.R. § 51.166(b)(3)(i)(a) (emphasis added).

2. Actual emissions: "the actual rate of emissions of a pollutant from an emissions unit . . . In general, actual emissions as of a particular date shall equal the average rate, in *tons per year*, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. . . . Actual emissions shall be calculated using the unit's *actual operating hours*, production rates, and types of materials processed, stored, or combusted during the select time period." 40 C.F.R. § 51.166(b)(21)(i), (ii) (emphasis added).

3. Netting: combine step two with: "[a]ny other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable." 40 C.F.R. § 51.166(b)(3)(i)(b).

4. Significant: The net emissions increase must exceed pollutant specific annual emissions thresholds expressed in tons per year. For example, the net emissions increase for sulfur dioxide must exceed 40 tons per year to trigger the PSD requirements. 40 C.F.R. § 51.166(b)(23)(i).

The lower courts' interpretation of this regulatory language as warranting an hourly emissions test is completely unfounded. The words "hourly emissions" exist nowhere in the text of the regulations. Thus, it is unsurprising that the Fourth Circuit's decision omits any explanation for how the regulations could be read to establish an hourly test. In light of the plain regulatory language establishing an actual annual emissions test for determining PSD applicability, the Fourth Circuit's conclusion that EPA must apply an hourly test should be rejected.

B. The EPA Regulations and Related Case Law Regarding PSD Confirm that Duke Was Required to Consider Increased Emissions Caused by Increased Hours of Operation When Evaluating Whether PSD Requirements Applied to its Plant Renovations.

The "net emissions increase" step of the "major modification" test clearly requires a comparison of the pre- and post-project annual emissions, including "actual operating hours." 40 C.F.R. § 51.166(b)(21)(ii). The lower courts' determination that the pre-project hours of operation must remain constant in calculating the emissions increase is simply incorrect. *See Duke Energy*, 411 F.3d at 545, *Duke Energy*, 278 F. Supp. 2d at 640. The so-called "hours of operation exclusion," which states that "[a] physical change . . . shall not include . . . [a]n increase in hours of operation," does not apply to this case. *See* 40 C.F.R. § 51.166(b)(2)(iii)(f). Rather, this exclusion simply clarifies that a facility that is not operating at capacity may increase its hours of operation "to take advantage of favorable market conditions," 45 Fed. Reg. 52,676, 52,704 (Aug. 7, 1980), without triggering PSD requirements, as long as this increase is achieved without an associated "physical change in or change in the method of operation of," 40 C.F.R. § 51.166(b)(2)(i), the source. In other words, an increase in hours of operation, on its own, does not constitute an NSR-triggering physical or operational change. The exclusion does not apply to the present case because the increase in hours of operation occurred as a result of the physical changes that Duke made to its facilities.

EPA and the courts have consistently interpreted the exclusion in this manner. EPA confirmed the narrow application of the hours of operation exclusion when it

issued the applicability determination for the proposed modifications at the WEPCO plants. WEPCO argued that since "any emissions increases would be due to increased production rates or hours of operation rather than higher emissions per unit of production. . . . these increases should be excluded from consideration in determining whether a net significant emissions increase and, hence, a major modification, would occur." *Applicability of Prevention of Significant Deterioration Requirements (PSD) and New Source Performance Standards (NSPS) Requirements to the Wisconsin Electric Power Company (WEPCO) Port Washington Life Extension Project*, Memorandum From: Don R. Clay, Acting Asst. Admin. For Air and Radiation, To: David A. Kee, Director, Air and Radiation Division, Region V, Sept. 9, 1988, p. 8 (Joint Appendix "JA" 257-58). EPA responded to WEPCO's argument by stating that:

> The WEPCO is incorrect in this regard. . . . the exclusions cited by WEPCO are intended to apply where a source increases emissions by simply combusting a larger amount of fuel, or processing a larger amount of raw materials during a given time period, or by expanding its hours of operation 'to take advantage of favorable market conditions' (see 45 FR 52704) . . . *it is obvious that WEPCO's plans to increase production rate or hours of operation are inextricably intertwined with the physical changes planned* under the life extension project. . . . [A]ccepting WEPCO's interpretation of the major modification regulations would serve to exclude from consideration all physical or operational changes except those which cause increased emissions per unit of production. Clearly, EPA never intended this result. It would allow, through substantial capital investment, significant expansion of the pollution-emitting

> capacity and longevity of major industrial facilities without PSD review of the impacts on air quality.

Id. (emphasis added).

In a follow up letter to the Vice President of WEPCO, EPA staff again confirmed the narrow application of the exclusion by stating that "an increase in any one of these three factors [emission rate, production rate or capacity utilization, and hours of operation], if attributable to a physical or operational change, can trigger an emissions increase for PSD purposes . . . EPA explicitly assumed that emissions increases . . . would come . . . from increases in production rate or hours of operation. . . . The hourly capacity demonstration for NSPS purposes is not relevant to the PSD analysis." Letter From: Don R. Clay, Acting Asst. Admin. For Air and Radiation, To: John W. Boston, Vice President of WEPCO, February 15, 1989, pp. 9-10 (JA 294-95). EPA's applicability determination in regard to the hours of operation exclusion was ultimately confirmed by the Seventh Circuit where the court decided, *inter alia*, that "[d]espite WEPCO's protestations, we note initially that the EPA's refusal to apply the 'production rate/hours of operation exclusion' was proper. This exclusion . . . was provided to allow facilities to take advantage of fluctuating market conditions, *not* construction or modification activity." *WEPCO*, 893 F.2d at 916 n.11 (internal citations omitted) (emphasis added). *See also Puerto Rican Cement*, 889 F.2d at 298.

This application of the exclusion was again memorialized in the preambles to EPA's 1992 and 2002 rules: "Although a source may vary its hours of operation or production as part of its everyday operations, an increase in emissions attributable to an increase in hours of operation or

production rate which is the result of a construction-related activity is not excluded from review." 57 Fed. Reg. 32,314, 32,328 (July 21, 1992). "[A]n increase in utilization should not trigger the major NSR requirements unless it is related to a physical or operational change. . . . [T]he CAA only applies the major NSR requirements to emissions increases that are the result of a physical or operational change. Thus, we do not believe that the major NSR requirements should apply to a utilization increase unless the increase is related to the modification." 67 Fed. Reg. 80,186, 80,203 (Dec. 31, 2002).

Failing to cite a single EPA regulation or judicial decision in support of its broad-based interpretation of the hours of operation exclusion, Duke relies solely on an internal EPA memorandum and a letter written by a single EPA staff member in the early 1980s. *See* Memorandum From: Edward E. Reich, Director Division of Stationary Source Enforcement, To: Charles Whitmore, Chief, Technical Analysis Section, Region VII, Jan. 22, 1981 (JA 35-37). *See also* Letter From: Edward E. Reich, To: Amasjit S. Gill, General Electric, June 24, 1981 (JA 27-28). Given that the consistent EPA documents (discussed above) were written both before and after the conflicting memorandum and letter, as the court in *Puerto Rican Cement* similarly held, "these materials do not show a significant, legally recognizable 'conflict' within the agency." 889 F.2d at 299. The Fourth Circuit cannot simply retract the plain language of the regulations and EPA's and the courts' historically consistent, narrow application of the exclusion based on one EPA staff member's misstep. *See id. See also Ohio Edison Co.*, 276 F. Supp. 2d at 876-77 (rejecting reliance on Reich letters for same proposition). Indeed, because "[t]he purpose of the 'consistency' doctrine

in administrative law is . . . to prevent the agency . . . from significantly changing those policies without conscious awareness of, and consideration of the need for, change," such a deviation in the application of the regulations would require EPA to undergo notice and comment rulemaking.[9] *Id.* The lower courts' reliance on these documents for applying the hours of operation exclusion to the present facts, and the resulting hourly emissions test, is therefore improper.

Since EPA and the courts have repeatedly and consistently described the appropriate application of the hours of operation exclusion, this narrow application should come as no surprise to Duke. As the Southern District of Indiana court explained in a similar PSD enforcement case,

> Congress sweepingly defined modification . . . [for PSD purposes], and the goal of the CAA was 'to speed up and intensify' the war against pollution. Moreover, the D.C. Circuit rejected the EPA's earlier attempts to make broad, categorical exclusions from the CAA's definition of modification. *See Ala. Power v. Costle*, 204 U.S. App. D.C. 51, 636 F.2d 323 (D.C.Cir.1979) [ ]. With this regulatory context in mind, a context that a sophisticated entity like SIGECO [or in this case Duke] was surely aware of, it would be inconsistent for the EPA to broadly define a regulatory exemption [for PSD].

SIGECO, 245 F. Supp. 2d at 1014.

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[9] In fact, EPA is currently taking comments on a proposed rule for an hourly emissions test for PSD. 70 Fed. Reg. 61,081 (Oct. 20, 2005). *See infra*, pp. 26-27. Therefore, EPA recognized that notice and comment rulemaking was necessary if such a departure is going to occur.

In sum, there is no merit to the Fourth Circuit's conclusion that EPA's PSD regulations authorize sources to exclude emissions resulting from increased hours of operation made possible by a physical change when assessing whether that change triggers PSD review. Here, Duke's massive renovations plainly enabled its plants to increase their hours of operation, dramatically increasing the actual amount of pollution they release into the air each year. By discounting those emission increases and proceeding without PSD review, Duke violated the Act.

C. An Hourly Emissions Rate Test for PSD Would Undermine the Purposes of the Act's PSD Provisions.

The NSPS and PSD programs were added to the Act at different times and serve different purposes. In 1970, Congress included the NSPS program in the Act and EPA was then required to promulgate technology-based emission limits for categories of sources without regard to site-specific factors. 42 U.S.C. § 7411(a)(1). In 1977, when the Act was amended, Congress added the PSD program to, *inter alia*, prevent the quality of the air from deteriorating in areas that are in attainment with the NAAQS. 42 U.S.C. § 7470. The NSPS program is based solely on the particular type of equipment or facility emitting the pollutants, whereas the PSD program establishes control requirements on a case-by-case basis taking into account site-specific factors such as the specific environmental impact a new or modified source will have upon the area where it will be located. *See* 57 Fed. Reg. 32,314, 32,315-316 (July 21, 1992). *See also Northern Plains Resource Council*, 645 F.2d at 1356. EPA reinforced these differences by promulgating different tests for triggering PSD and

NSPS requirements: "In contrast [to the NSPS hourly emissions rate test and] in light of the air quality planning component of the NSR program, the NSR regulations examine total actual annual emissions to the atmosphere. Consequently, normal operations over a period of time is considered for purposes of determining a source's impact on ambient air." 57 Fed. Reg. at 32,331. Only an annual emissions test will fulfill the purpose of the PSD program to prevent backsliding in regions where the air quality is adequate.

To prevent facilities from significantly deteriorating the air quality, PSD statutory and regulatory provisions, in conjunction with the SIPs, establish and assure compliance with "increments" or "maximum allowable increases" of pollutants. 42 U.S.C. § 7475(a), (d), 7473(a), (b); 40 C.F.R. § 51.166(c). An owner or operator of a facility seeking to make modifications must demonstrate that "emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of" these increments. 42 U.S.C. § 7475(a)(3). The PSD permitting process is the mechanism under which EPA examines appropriate consumption of these increments. 42 U.S.C. § 7475(a)(2). Since an hourly test does not capture the total actual emissions increases resulting from a change, EPA will not be able to accurately quantify adverse impacts on air quality when doling out preconstruction permits in PSD areas. The preamble to EPA's 1980 regulations supports this analysis:

> Source applicants . . . must . . . perform an analysis to compute how much of the PSD increment remains available to them. In general the amount of increment that is available depends on certain changes in actual emissions. . . . Accordingly, cleanup adds to the available growth margin while

> new emissions diminish it. . . . Once the question of how much increment remains is resolved, then the applicant must demonstrate that his proposed new emissions would not exceed the remaining PSD increment. Where a proposed project would cause a new violation of the increment or contribute to an existing violation, it cannot be approved. Existing violations must be entirely corrected before PSD sources which affect the area can be approved.

45 Fed. Reg. 52,676, 52,678 (Aug. 7, 1980).

Recognizing that not all emissions increases should trigger the PSD requirements, EPA established "*significant* net emissions increase" thresholds calculated in "tons per year."[10] 40 C.F.R. § 51.166(b)(23)(i) (emphasis added). Before establishing these thresholds, EPA analyzed the "cumulative effect on increment consumption of multiple sources in an area each making the maximum *de minimis* emissions increase (thereby going unreviewed under PSD at the time of the change)." 45 Fed. Reg. 52,676, 52,707 (Aug. 7, 1980). EPA understood that if too many unaccounted for insignificant modifications occurred, EPA would not be able to enforce the emission increments through the PSD permitting requirements. Yet, this is exactly what will happen if the Fourth Circuit's hourly test is sanctioned. Projects that do not increase hourly emissions but do significantly increase hours of operation, and, in turn, annual emissions, would escape PSD review. Unless EPA is able to consider actual annual emissions increases, including emissions resulting from increases in

[10] These significance thresholds are the fourth step in the "major modification" definition. *See supra* p. 15.

hours of operation, the emissions inventory will be severely disrupted, and the PSD program will not function properly.

D. Industry, Including Duke, Was Well Aware that the Test for PSD Was Annual Emissions, Not Hourly Emissions.

Following industry's initial challenge to the 1980 PSD regulations, a settlement agreement ensued, whereby EPA agreed to propose a regulatory amendment that would allow sources to "calculate emissions . . . based on either the actual emissions methodology in the existing rules or the unit's potential emissions, measured in terms of hourly emissions." 61 Fed. Reg. 38,250, 38,268 (July 23, 1996) (discussing and proposing language from 1982 Settlement Agreement). In other words, by entering into this settlement agreement, EPA and industry effectively agreed that the 1980 rules already included projects that increase actual annual emissions but do not increase potential hourly emissions and that EPA would propose and take public comment on an amendment to exclude such projects. If industry believed that such projects were already excluded from the 1980 PSD regulations, as they allege in this case, then there would be no incentive for industry, including Duke, to settle in 1982 based on EPA's agreement to propose their desired test for public comment.

In 1996, EPA proposed for public comment the language agreed to in the 1982 Settlement Agreement: "sources may calculate emissions increases and decreases . . . measured in terms of hourly emissions (i.e., pounds of pollutant per hour)." 61 Fed. Reg. at 38,268. EPA noted that "[t]he primary effect of an hourly potential test is to eliminate a source's level of operations as a factor when

determining whether a proposed change will result in an increase. Past and future level of utilization of the source are completely disregarded." *Id.* at 38,269. After a preliminary analysis of the proposed rule, EPA concluded that:

> [T]here is concern for the environmental consequences. For example, assume the emissions unit at the widget factory that is emitting 10 pounds an hour but has historically operated at 40 percent capacity due at first to operating cost, but with age, reduced efficiency and reliability. Under the [hourly potential test], the owner could modernize the unit . . . [and] allow the owner to use the machine at much higher levels (e.g., more hours per day or week) than it had in the past. As a result actual emissions (measured in tpy [tons per year]) could more than double due to the increase in utilization even though hourly potential emissions remain the same. . . . [O]ne of the most troubling side effects of the . . . proposal is that it could ultimately stymie major new source growth by allowing unreviewed increases of emissions from modifications of existing sources to consume all available increment in PSD areas. . . . [U]nder the . . . [proposal] an old grandfathered source could experience a 'significant' net increase in annual actual emissions, yet it would not necessarily be subject to review.

Id. at 38,269, 38,270.

In 2002, after receiving comments on the hourly emissions test for triggering PSD review, EPA rejected the test. 67 Fed. Reg. 80,186, 80,205 (Dec. 31, 2002). EPA reasoned that an hourly test

> could sanction greater actual emissions increases to the environment . . . without any preconstruction review. In addition, actual emissions increases resulting from unreviewed projects could go largely undocumented until a PSD review is performed by a new or modified facility that ultimately must undergo review. By that time, however, a violation of an increment could have unknowingly occurred. . . . We agree that . . . [the proposed hourly test] could lead to unreviewed increases in emissions that would be detrimental to air quality and could make it difficult to implement the statutory requirements for state-of-the-art controls.

Id.

Although EPA's latest proposed PSD regulations depart from the lengthy historic consistency described above, it only further illustrates that the regulations applicable in this case provide for an actual annual emissions test. In October, 2005, EPA requested public comment on amendments to the PSD program that would allow existing power plants, such as Duke's, "to use the same maximum achievable hourly emissions test we apply under NSPS to determine whether a physical change in or change in the method of operation . . . results in an emissions increase." 70 Fed. Reg. 61,081, 61,088 (Oct. 20, 2005). Indeed, EPA states in the 2005 proposed rule that "EPA entered into a Settlement Agreement which required us to propose an NSPS-like, hourly-potential-to-hourly-potential emissions increase test for modification," and that the current PSD rules require "a source [to] look[] at whether a project will result in a significant emissions increase on an annual basis." *Id.* EPA asks for comment on this proposed rule a minimum of 25 times in the 22-page document; EPA recognizes that the proposed rule is a

stark departure from the previous long-standing actual annual emissions test.[11]

EPA's use of an actual annual emissions test, rather than an hourly potential test, should come as absolutely no surprise to Duke. EPA was quite capable of writing an hourly emissions test if it so desired, as it plainly did for the NSPS program 30 years ago and as it has only now proposed for the PSD program. If industry and EPA believed that an hourly rather than annual test already existed, the 1982 settlement, the resulting 1996 proposal, the 2002 rejection of that proposal, and the subsequent 2005 proposal would not be necessary.

CONCLUSION

The decision of the Fourth Circuit Court of Appeals should be reversed in its entirety.

Dated: July 21, 2006

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[11] The 2005 proposal clearly states that "[t]he proposed rule would only apply prospectively." 70 Fed. Reg. at 61,081 (Oct. 20, 2005).

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In The Supreme Court of the United States

ENVIRONMENTAL DEFENSE,
NORTH CAROLINA SIERRA CLUB,
NORTH CAROLINA PUBLIC INTEREST RESEARCH
GROUP CITIZEN LOBBY/EDUCATION FUND,

Petitioners,

v.

DUKE ENERGY CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS WITH APPENDIX

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CASES

Alaska Dept. Of Env'l Cons. v. EPA,
540 U.S. 461 (2004) 5, 6

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443 F.3d 880 (D.C. Cir. 2006) 5, 7

STATUTES

33 U.S.C. § 1267 3

42 U.S.C. § 7411(a)(4) 7

42 U.S.C. § 7470 ..... 3, 6, 27

42 U.S.C. § 7470(2) 30

42 U.S.C. §§ 7470-79 3

42 U.S.C. § 7607(b) 5

RULES

Sup. Ct. R. 37.3(a) 1

Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

H.R. Rep. No. 94-1175 (1976) 6

H.R.Rep. No. 95-294 (1977), reprinted in
1977 U.S.C.C.A.N. 1077 6

S. Rep. No. 95-127 6

Adirondack Park Agency, *The Adirondack Park, at*
http://www.apa.state.ny.us/About Park/index.html
(last visited 7/15/2006) 19

Alan White, *Mercury Advisories an Early Warning of Atmospheric Pollution in the Catskills*, 20
Kaatskill Life, No. 1, 12 (Spring 2005) 25

The Catskill Center for Conservation and Development,
The Catskill Mountain Region, at
http://www.catskillcenter.org/region/region1.html
(last visited 7/15/2006) 19

Charles T. Driscoll et al., *Acid Rain Revisited: Advances in Scientific Understanding Since the Passage of the 1970 and 1990 Clean Air Act Amendments,* Hubbard Brook Research
Foundation (2001) *available at*
http://www.hubbardbrook.org/
hbrf/publications/Acid Rain Revisited.pdf 21, 23

Charles T. Driscoll et al., *Acidic Deposition in the Northeastern United States: Sources and Inputs, Ecosystem Effects, and Management Strategies*,
BioScience, (March 2001) *available at*
http://www.ingentaconnect.com/content/aibs/
bio/2001/00000051/00000003/
art00004;jsessionid=w8yzjh191elf.alice 22, 23

Charles T. Driscoll et al., *Nitrogen Pollution in the Northeastern United States: Sources, Effects, and Management Options*, 53 BioScience 357 (2003), *available at* http://www.eeb.cornell.edu/goodale/2003%20Driscoll%20etal%20Biosci.pdf 8, 10, 12, 27

Chesapeake 2000 Agreement, Preamble, *available* at http://www.epa.gov/region3/chesapeake/uaasupport.htm (last visited 7/17/2000) 7, 8, 10, 29

Chesapeake Bay Foundation, *Mercury Deposition in the Chesapeake, at* http://www.cbf.org/site/DocServer/facsheet final3.pdf?docID=3923 (last visited 7/15/2006) 15

Chesapeake Bay Foundation, *State of the Bay Report 2005, available at* http://www.cbf.org/site/PageServer?pagename=sotb 2005 index 13

Chesapeake Bay Program, *Air Pollution and the Chesapeake Bay,* slides titled *Sources of Nitrogen Loads to the Bay* and *Types of NOx Emission Sources from States that Contribute the Most Nitrogen Deposition to the Bay and Its Watershed* (January 6, 2000), *available at* http://www.chesapeakebay.net/stressor1.htm 9, 11, 12

Chesapeake Bay Program, *Air Pollution, at* http://www.chesapeakebay.net/air pollution.htm (last visited 8/08/2005) 12

Chesapeake Bay Program, *Bay Program Partners, at* http://www.chesapeakebay.net/baypartners.htm (last visited 7/18/2006) 9

Chesapeake Bay Program, *Dissolved Oxygen: Annual Assessment, available at* http://www.chesapeakebay.net/status.cfm?sid=207 (last visited 7/11/2006) 2

Chesapeake Bay Program, *Frequently Asked Questions About Restoring Chesapeake Bay Water Quality* (April 2003), *available at* http://www.chesapeakebay.net/pubs/waterqualitycriteria/water quality faq final.PDF 8

Chesapeake Bay Program, *Reducing Nutrient Pollution, at* http://www.chesapeakebay.net/nutr2.htm (last updated 10/04/2004) 10

Chesapeake Bay Program, *Simulated Nutrient and Sediment Load Reductions (1985-2004), at* http://www.chesapeakebay.net/status.cfm?SID=186 (last visited 7/17/2006) 29

Chesapeake Bay Program, *What is Dissolved Oxygen and Why is it Important to the Chesapeake Bay* (July 2004) *available at* http://www.chesapeakebay.net/pubs/doc-do_101_backgrounder.pdf 12

David C. Evers, *Mercury Connections: The Extent and Effects of Mercury Pollution in Northeastern North America*, BioDiversity Research Institute (2005), *available at* http://www.nwf.org/wildlife/pdfs/MercuryinWildlifeReport.pdf 13, 17, 25

Department of Health and Human Services and Environmental Protection Agency, *What You Need to Know About Mercury in Fish and Shellfish* (March 2004), *at* http://www.cfsan.fda.gov/~dms/admehg3.html 17

Dr. Mark Cohen, NOAA Air Resources Laboratory, *Atmospheric Mercury: Emissions, Transport/Fate, Source-Receptor Relationships* (January 19-20, 2006) *available at* http://www.arl.noaa.gov/data/web/reports/cohen/cohen niagara first talk version c.pdf 13

Dr. Marc Cohen, NOAA Air Resources Lab, *Modeling the Fate and Transport of Mercury in the Chesapeake Bay,* 5/17/2004, *at* http://www.arl.noaa.gov/data/web/reports/ cohen/20 Ches Bay talk.pdf (last visited 7/15/2006) 15

Ecological Effects Subcommittee of EPA Advisory Council on Clean Air Compliance Analysis, *Advisory on Plans for Ecological Effects Analysis in the Analytical Plan for EPA's Second Prospective Analysis – Benefits and Costs of the Clean Air Act, 1990-2020*, (June 23, 2005) *available at* www.epa.gov/sab/pdf/council ees advisory council-adv-05-001.pdf 8

Energy Information Administration, Office of Integrated Analysis and Forecasting, U.S. Department of Energy *Analysis of Strategies for Reducing Multiple Emissions from Power Plants: Sulfur Dioxide, Nitrogen Oxides, and Carbon Dioxide* (December 2000) *available at* http://tonto.eia.doe.gov/FTPROOT/ service/oiaf0005.pdf 21

Environmental Integrity Project, *Dirty Kilowatts: America's Most Polluting Power Plants* 1 (May 2005), *at* http://www.environmentalintegrity.org/ pubs/Dirty%20Kilowatts%20FINAL.pdf 14

EPA, *Air Data, Generating Reports and Maps, at* http://www.epa.gov/air/data/reports.html (last visited 7/19/2006) 26

EPA *Acid Rain Program, Preliminary Summary Data Reports, at* http://www.epa.gov/airmarkets/emissions/prelimarp/index.html (last visited 7/19/2006) 26

EPA, *Chesapeake Bay: Introduction to an Ecosystem*, EPA 903-R-04-003 (July 2004) *available at* http://www.chesapeakebay.net/pubs/ecosystem.pdf 9

EPA, *Controlling Power Plant Emissions: Controlling Mercury with Existing Controls, at* http://www.epa.gov/mercury/control emissions/tech exist.htm (last updated July 5, 2006) 28

EPA, *Fate and Transport and Ecological Effects of Mercury* (last updated July 11, 2006), *at* http://www.epa.gov/mercury/eco.htm 17

EPA, *Fish Consumption Advisories for Mercury* (2004) *at* http://epa.gov/waterscience/fish/advisories/slides2004_1 files/slide6.html 18

EPA, *Health and Environmental Impacts of NOx*, *supra* note 67; *see also* EPA, *Ground-level Ozone: What is it? Where does it come from?* (last updated March 2, 2006) *at* http://www.epa.gov/air/urbanair/ozone/what.html (last visited 7/17/2006) 21, 23, 24

EPA, *How Nitrogen Oxides Affect the Way We Live and Breath* (September 1998), *available at* http://www.epa.gov/oar/noxfldr.pdf 11

EPA, *Mercury Health Effects*, *at* http://www.epa.gov/mercury/effects.htm (last visited July 14, 2006) 17, 18

EPA, *Mercury Study Report to Congress*, EPA-453/R-98004a (U.S.Govt. Printing Office Wash., DC, Dec. 1997) 13

EPA, *Monitoring Needed to Assess Impact of EPA's Clean Air Mercury Rule on Potential Hotspots* Report No. 2006-P-00025 (May 15, 2006), *available at* http://www.epa.gov/oig/reports/2006/20060515-2006-P-00025.pdf 15

EPA National Estuary Program, *Air Pollution and Water Quality*, at National Wildlife Federation, *Mercury in the Mid-Atlantic: Are States Meeting the Challenge?* (January 2005) *at* http://www.epa.gov/owow/estuaries/airdep.htm (last visited 7/17/2006) 10

EPA, *Technical Support Document for Identification of Chesapeake Bay Designated Uses and Attainability* (August 2003) (hereinafter *Technical Support Document*), *available at* http://www.epa.gov/region3/chesapeake/uaasupport/chapterii8 3.pdf 7, 8, 9, 13

Hubbard Brook Research Foundation, Testimony to the United States Environmental Protection Agency in Response to the EPA's 2004 Mercury Regulatory Package, *available at* http://www.hubbardbrook.org/hbrf/HBRF mercury comments.pdf (last visited 7/14/2006) 24

Jerry Jenkins et al., Adirondack Lakes Survey Corp., *Acid Rain in the Adirondacks: A Research Summary*. Adirondack Lakes Survey Corporation (October 2005), *available at* http://www.adirondacklakessurvey.org/sosindex.htm 25

Kathryn R. Mahaffey et al., *Blood Organic Mercury and Dietary Mercury Intake: National Health and Nutrition Examination Survey, 1999 and 2000*, 112 Environmental Health Perspectives, No. 5 (April 2004), *available at* http://www.ehponline.org/members/2003/6587/6587.pdf 18

Kristen Chossek Malecki et al., *The Chesapeake Bay Health Indicators Project: Linking Ecological and Human Health, available at* www.cbf.org/site/DocServer/hopkins_0614report.pdf?docID=1923 (last visited 7/15/2006) 15

March 19, 2004 Proclamation of George E. Pataki, Governor, State of New York, *available at* http://www.catskillpark.org/history/proclamation.htm 20

Maryland Department of the Environment, *Fish Facts for Pregnant Women, Women Who May Become Pregnant, Nursing Mothers, Children Age 6 and Younger at* http://www.mde.state.md.us/assets/document/Fish%20Facts%20English.pdf#Fish A (last visited 7/18/2006) 2

National Wildlife Federation, *Controlling Mercury from Power Plants: Current State of Technology* (April 2006) *available at* www.nwf.org/wildlife/pdfs/MercuryPollutionControls.pdf 28

National Wildlife Federation, *Mercury in the Mid-Atlantic: Are States Meeting the Challenge?* (January 2005) *at* http://www.nwf.org/wildlife/pdfs/MercuryMidAtlantic.pdf 16, 17, 18

National Wildlife Federation, *Study Finds Maryland Health Air Act Will Save Lives, Benefit Economy* (March 6, 2006), *available at* http://www.nwf.org/news/story.cfm?pageId=CFD3DC21_C42A_E6C7_D22B4652CBA6DC3C 29

Pennsylvania Department of Environmental Protection, *Data Collected Over Eight Years Shows Mercury Levels 47% Higher in Areas Near Power Plant* (May 31, 2006) at http://www.depweb.state.pa.us/news/cwp/view.asp?a=3&q=507034 14

Sierra Club, *Clean Air, Dirty Coal Power, at* http://www.sierraclub.org/cleanair/factsheets/power.asp (last visited 7/17/2006) 11, 14

Strategies for Reducing Multiple Emissions, supra note 66 at ix; EPA, *Health and Environmental Impacts of NOx, at* http://www.epa.gov/air/urbanair/nox/hlth.html 21, 28

Susan A. Korrick et al., *Effects of Ozone and Other Pollutants on the Pulmonary Function of Adult Hikers,* 106 Environmental Health Perspectives, No. 2 (February 1998) *available at* http://www.ehponline.org/docs/1998/106p93-99korrick/korrick-full.html 24

Susan O'Brien, *Study Released Today Reveals Dangerously High Mercury Levels in Maryland Rain* (C.B.F. May 23, 2003), *available at* www.cbf.org/site/News2?page=NewsArticle&id=6793 .. 17

Suzanne B. Bricker et al., National Oceanic and Atmospheric Administration, National Ocean Service, *National Estuarine Etrophication Assessment, Effects of Nutrient Enrichment in the Nation's Estuaries* (September 1999), *available at* http://spo.nos.noaa.gov/projects/cads/nees/Eutro Report.pdf 11

Testimony of New York Attorney General Eliot Spitzer before the U.S. Environmental Protection Agency, March 31, 2003, *at* http://www.oag.state.ny.us/press/statements/usepa cleanair testimony.pdf 20

Todd Kuiken et al., National Wildlife Federation, *Cycle of Harm: Mercury's Pathway from Rain to Fish in the Environment* (2nd ed. May 2003) *available at* http://www.nwf.org/nwfwebadmin/binaryVault/CycleofHarmFinalJ.pdf ..... *passim*

Victor B. Flatt & Kim Diana Connolly, Center for Progressive Regulation *'Grandfathered' Air Pollution Sources and Pollution Control: New Source Review Under the Clean Air Act* (March 2005), *available at* http://www.progressiveregulation.org/articles/NSR 504.pdf 6

William C. Malm, National Park Service, *Introduction to Visibility* (May 1999) *available at* http://vista.cira.colostate.edu/improve/Education/intro to visibility.pdf 23

Yekaterina Korastash, *EPA's New Regulatory Policy: Two Steps Back*, 5 N.C.J.L. & Tech. 295 (Spring 2004) 27

INTEREST OF AMICI CURIAE[1]

The Chesapeake Bay Foundation (CBF) is the only independent private nonprofit organization dedicated solely to restoring and protecting the Chesapeake Bay and its tributary rivers. Since 1967, CBF's goal has been to improve water quality by reducing pollution. CBF's motto is *Save the Bay*.

The Chesapeake Bay watershed covers portions of 6 states (Delaware, Maryland, New York, Pennsylvania, West Virginia, and Virginia) and the District of Columbia. The Bay's airshed is much larger. Air pollution, including emissions from power plants, has substantial negative impacts on the health of the Chesapeake Bay. Numerous aging and uncontrolled power plants (i.e., without modern pollution controls) operate in the Bay's airshed. The Fourth Circuit's decision, if upheld, would eviscerate the "Prevention of Significant Deterioration" (PSD) program and its requirement to install the Best Available Control Technology (BACT) for sources that modify their plants. Without a PSD program, such sources in the Bay's airshed would be permitted to continue polluting the Bay. Thus, the control of emissions from power plants at issue in this case is of particular significance to CBF's efforts to save the Bay.

The Bay suffers from nutrient overload, to which nitrogen air pollution from power plants contributes a significant amount. Excess nutrients cause algal blooms that deplete the oxygen in the Bay, damaging critical resources. In

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[1] Pursuant to Supreme Court Rules 37.3(a) and 37.6, the undersigned represents that (1) all parties consented to the filing of this brief; (2) no counsel for any party authored this brief either in whole or in part; and (3) no person or entity other than the above-named amici curiae and their counsel made any monetary contribution to its preparation or submission. The letters of consent are being submitted with this brief.

2005, the amount of water with no oxygen in certain areas of the Chesapeake Bay was among the worst on record. More than three quarters of the Bay failed to meet dissolved oxygen restoration goals in that summer.[2]

Mercury pollution is also a severe problem in the Chesapeake Bay – and power plants are the major contributor to mercury pollution in the Bay. Government advisories prohibit or limit the consumption by pregnant women and women of child-bearing age of numerous species of fish within the Bay watershed (64,000 square miles) based upon mercury contamination.[3] Interpreting the PSD statutory and regulatory provisions as they have been interpreted for almost 30 years would require the installation of BACT on power plants that make physical or operational changes that increase actual emissions. The installation of BACT for sulfur dioxide and nitrogen oxides on power plants within the Bay's airshed will produce a "co-benefit" of reducing mercury emissions and significantly improve the Chesapeake Bay and the environment.

The Adirondack Mountain Club (ADK) is also a membership-supported, non-profit organization. Its central purpose is the preservation of the mountains, forests, lakes and wilderness ecosystems of the Adirondack and Catskill Forest Preserves so that they are "forever wild" as mandated by Article 14, section 1 of the Constitution of the State of New York. ADK's members hike, canoe and camp in mountains,

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[2] Chesapeake Bay Program, Dissolved Oxygen: Annual Assessment, *available at* http://www.chesapeakebay.net/status.cfm?sid=207 (last visited 7/11/2006).

[3] *See e.g.*, Maryland Department of the Environment, *Fish Facts for Pregnant Women, Women Who May Become Pregnant, Nursing Mothers, Children Age 6 and Younger at* http://www.mde.state.md.us/assets/document/Fish%20Facts%20English.pdf#Fish_A (last visited 7/18/2006).

forests and lakes of New York, Vermont, New Hampshire and Maine. All of these wilderness recreation areas have been severely impacted by mercury deposition, acid rain, and acid deposition.

As in the Bay region, mercury emissions from power plants are major contributors to contamination of fish and wildlife in the Adirondacks and Catskills. Moreover, power plants without modern pollution controls also emit high levels of sulfur dioxide and nitrogen oxide that form acid deposition and low-level ozone. These compounds contribute to the acidification of lakes and streams, with severe impacts to flora and fauna in these regions. They also impair visibility and harm respiratory health. Nitrogen oxide also causes low level ozone, another serious health risk. Reducing and eliminating acid deposition, smog, haze and mercury emitted by coal-burning power plants is therefore essential to preserving and restoring the natural ecosystems and human appreciation of the Adirondacks, the Catskills, and the Chesapeake Bay.

Both the enforceability and implementation of the Clean Air Act's PSD program (42 U.S.C. §§ 7470-79) at issue in this case concern direct harms to the Bay, the Adirondacks, and the Catskills, as well as to efforts by the CBF and ADK to reduce air pollution. The efforts of CBF and ADK also promote an express purpose of the PSD Program – to preserve, protect, and enhance air quality in "areas of special national or regional natural, recreational, scenic, or historic value," 42 U.S.C. § 7470, like the Chesapeake Bay and the Adirondacks and Catskills. *See also* 33 U.S.C. § 1267. Congress and EPA designed the PSD program to safeguard air quality in these areas, as well as others, by controlling emissions from new and modified stationary sources, including coal-fired power plants such as those of respondent in this case. How this Court interprets the CAA and EPA's PSD regulations at issue here will have a direct impact upon sources within the Bay's air and

water sheds and those within the Adirondacks' and Catskills' airshed, as well as upon the environment within these regions.

CBF's efforts are supported by its 140,000 members, volunteers, concerned citizens, advocates, and staff. CBF's staff of 170 – including scientists, policy experts, attorneys, educators, and grassroots organizers – pursues its goal through environmental advocacy, litigation, environmental education, strategic communications, and habitat restoration throughout the Chesapeake Bay watershed. CBF informs and engages the public, the private sector, and government officials, in an effort to obtain legislative and regulatory decisions and public and private investments to save the Chesapeake Bay.

The efforts of the ADK, which was founded in 1922, are supported by over 30,000 members with 26 chapters in New York, New Jersey and New England. ADK's mission is the preservation of the natural ecosystems of the Adirondack and Catskill Mountains as "forever wild." N. Y. CONST. art. XIV. ADK pursues the preservation and protection of these wilderness lands, and hence the health and well being of its members, through litigation and public policy advocacy at the state and federal levels.

SUMMARY OF ARGUMENT

The purpose of this brief is to impress upon the Court the importance of implementing the terms of the Clean Air Act (CAA) in a manner that will accomplish what the plain language, structure, and the intent of the CAA demand -- reducing air pollution. If the PSD program at issue in this case does not require aging and dirty power plants to control pollutants when they make changes that increase emissions, the Chesapeake Bay, the Adirondacks and Catskills, and this country, will continue to suffer from excess air emissions. In contrast, implementing the PSD Program as the CAA dictates

and as Congress intended will help save the Bay, the Adirondacks and Catskills. The Chesapeake Bay Foundation and Adirondack Mountain Club respectfully request that the Court reverse the Fourth Circuit's decision and apply the PSD program to all sources with actual annual emission increases, to promote clean air and protect the environment.

ARGUMENT

There are two issues in this case: first, did the Fourth Circuit err in interpreting the CAA in a manner that allows power plants to undertake physical changes that increase actual annual emissions without complying with the PSD program, so long as a power plant's hourly emission rate does not increase. Second, did the Fourth Circuit err in reviewing the validity of EPA's national CAA regulations in the context of an enforcement action, when the CAA provides that such regulations may be challenged exclusively in the D.C. Circuit by petition for review, filed within 60 days of the regulations' promulgation. 42 U.S.C. § 7607(b). While Petitioners' brief will address both of these important legal issues, and each provides a compelling basis for reversal by the Supreme Court, the Chesapeake Bay Foundation and the Adirondack Mountain Club focus their amicus brief on the environmental impacts associated with the Fourth Circuit's approach to measuring emission increases under the PSD program.

The CAA's PSD program is part of the Act's larger "New Source Review" (NSR) program. NSR is "a permitting process that imposes specific pollution control requirements depending upon the geographic location of the source." *New York v. EPA*, 443 F.3d 880, 883 (D.C. Cir. 2006). To ensure air quality in attainment areas, or areas that are already "clean," Congress enacted the statutory PSD program in the 1977 Amendments to the CAA so that the air quality in such areas would not degrade. *Alaska Dept. of Env'l Cons. v. EPA*, 540

U.S. 461, 470-71 (2004). Congress was expressly concerned with the quality of air in "areas of special national or regional natural, recreational, scenic, or historic value." 42 U.S.C. § 7470. The PSD legislation requires major modifications to or construction of pollution sources in attainment areas to install BACT. Installation of this technology during modification of existing coal-fired power plants would control the emissions of, *inter alia*, nitrogen oxide and sulfur dioxides, and would also decrease mercury emissions.

In the 1977 amendments to the CAA, Congress provided a qualified exemption to existing sources from PSD requirements, arising out of the recognition that "it is not physically or economically feasible to retrofit . . . control technology" for some of the older or smaller sources. H.R. Rep. No. 94-1175 at 159 (1976). Congress was confident, however, that older plants would over time either shut down, or by modifying, be required to control their pollution.[4] These assumptions proved not to be true, due to extensive "life extension" projects at these old coal-fired plants, and the failure of utilities like Duke Power to comply with the requirements of PSD permitting. *See infra* § III. Although the CAA gave older plants a "pass" on immediately installing pollution control technology, the PSD program was designed to revoke that pass once modifications were made.

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[4] *See* H.R.Rep. No. 95-294, at 211 (1977), reprinted in 1977 U.S.C.C.A.N. 1077, 1290; S. Rep. No. 95-127, at *128 (1977) ("approximately 200 coal-fired plants [are] over 20 years of age" and "[m]ost will be retired in the next 5 to 20 years"); Victor B. Flatt & Kim Diana Connolly, Center for Progressive Regulation, *'Grandfathered' Air Pollution Sources and Pollution Control: New Source Review Under the Clean Air Act* (March 2005), *available at* http://www.progressiveregulation.org/articles/NSR_504.pdf.

No one can seriously challenge that Congress'1977 Amendments to the CAA created "a law intended to limit increases in air pollution." *New York*, 443 F.3d at 886. As noted above, modifications of stationary sources trigger the PSD requirements. The CAA defines "modification" as "any physical change in, or change in the method of operation of, a stationary source *which increases the amount of any air pollutant emitted by such source* . . . ." 42 U.S.C. § 7411(a)(4) (emphasis added). The Fourth Circuit's decision construes the CAA in a manner which is directly at odds with the mandate to prevent increases in pollution, and will allow excessive and controllable amounts of pollutants to continue to be emitted by old and dirty power plants even where plants are upgraded to extend their years of operation. Application of this decision will result in substantial negative impacts on vital environmental and natural resources, including the regions of the Chesapeake Bay, the Adirondacks, and the Catskills.

I. The Chesapeake Bay is a National Treasure that Merits the Protection Afforded by the PSD Program Limiting Pollutants from Power Plants

The Chesapeake Bay, a national treasure, is the largest and most biologically diverse estuary in North America.[5] The Chesapeake Bay is home to about 3,600 species of unique animals, fish, and plants, including bald eagles, blue crabs, menhaden, striped bass (rockfish), osprey, oysters, and the

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[5] EPA, *Technical Support Document for Identification of Chesapeake Bay Designated Uses and Attainability* 14 (August 2003), *available at* http://www.epa.gov/region3/chesapeake/uaasupport/chapterii8_3.pdf (hereinafter *Technical Support Document*); Chesapeake 2000 Agreement, Preamble, *available at* http://www.epa.gov/region3/chesapeake/uaasupport.htm (hereinafter *Chesapeake 2000 Agreement*) (last visited 7/17/2000).

American lotus.[6] One million waterfowl spend the winter in the Chesapeake Bay basin.[7] As an estuary and coastal zone, it is "among the most productive ecosystems on Earth."[8]

The Chesapeake Bay and its tributaries have supported the region's economy and shaped its traditions and cultures for over 300 years.[9] In 1989, the Bay's value was estimated to be $678 billion.[10] The Chesapeake Bay produces about 500 million pounds of seafood each year.[11] Nearly sixteen million people live in the watershed for the Chesapeake Bay.[12]

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[6] EPA, *Technical Support Document*, *supra* note 5 at 14; Ecological Effects Subcommittee of EPA Advisory Council on Clean Air Compliance Analysis, *Advisory on Plans for Ecological Effects Analysis in the Analytical Plan for EPA's Second Prospective Analysis - Benefits and Costs of the Clean Air Act, 1990-2020*, 12 (June 23, 2005) (hereinafter *Ecological Effects*) *available at* www.epa.gov/sab/pdf/council_ees_advisory_council-adv-05-001.pdf.

[7] EPA, *Technical Support Document*, *supra* note 5 at 14.

[8] Charles T. Driscoll et al., *Nitrogen Pollution in the Northeastern United States: Sources, Effects, and Management Options*, 53 BioScience 357 (2003) (hereinafter *Nitrogen Pollution*), *available at* http://www.eeb.cornell.edu/goodale/2003%20Driscoll%20etal%20Biosci.pdf.

[9] *Chesapeake 2000 Agreement*, *supra* note 5 at Preamble.

[10] Chesapeake Bay Program, *Frequently Asked Questions About Restoring Chesapeake Bay Water Quality* (April 2003), *available at* http://www.chesapeakebay.net/pubs/waterqualitycriteria/water_quality_faq_final.PDF.

[11] *Ecological Effects*, *supra* note 6 at 12.

[12] EPA, *Technical Support Document*, *supra* note 5 at 18.

The Chesapeake Bay proper is approximately 200 miles long, stretching from Havre de Grace, Maryland, to Norfolk, Virginia. The Bay watershed encompasses 64,000 square miles and some or all of six states and the District of Columbia.[13] The Chesapeake Bay's airshed is even larger – by 6.5 times – covering roughly 1,081,600 square km (418,000 miles) in size, and touching thirteen states.[14]

Reflecting the significance of the Chesapeake Bay to the region and the country, three states – Maryland, Virginia, and Pennsylvania – as well as the District of Columbia and the federal government entered into agreements in 1983 and 1987 that establish the Chesapeake Bay Program partnership to protect and restore the Bay's ecosystem. In 2000, these same partners reaffirmed their commitments in the Chesapeake 2000 Agreement.[15] This Agreement set forth the parties' goal of "continu[ing] efforts to achieve and maintain the 40 % nutrient

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[13] EPA, *Chesapeake Bay: Introduction to an Ecosystem*, EPA 903-R-04-003 (July 2004) *available at* http://www.chesapeakebay.net/pubs/ecosystem.pdf; *see*, *The Chesapeake Bay Watershed* attached hereto at Appendix 1.

[14] EPA, *Technical Support Document*, *supra* note 5 at 40-44; Chesapeake Bay Program, *Bay Stressors – Air Pollution*, *at* http://www.chesapeakebay.net/air_pollution.htm; *see* Chesapeake Bay Program, *Air Pollution and the Chesapeake Bay*, slide titled *Area of NOx Emissions that Contribute Nitrogen Deposition to the Bay and Its Watershed* (January 6, 2000) (hereinafter *Air Pollution and the Chesapeake Bay*), *available at* http://www.chesapeakebay.net/stressor1.htm, attached hereto as Appendix 2.

[15] New York, Delaware, and West Virginia are state partners in the Chesapeake Bay Watershed. Chesapeake Bay Program, *Bay Program Partners*, *at* http://www.chesapeakebay.net/baypartners.htm (last visited 7/18/2006).

reduction goal agreed to in 1987."[16] The parties also agreed to "assess the effects of airborne nitrogen compounds and chemical contaminants on the Bay ecosystem and help establish reduction goals . . . ."[17] In 2003, the six Bay watershed states and the District of Columbia committed to reduce Bay nitrogen loads by 110 million pounds from year 2000 levels.[18] Installation of control technologies on power plants within the Bay's airshed under the PSD program would result in substantial reduction of nitrogen entering the Bay.

A. Emissions from Coal-Fired Power Plants Contribute Significant Amounts of Nitrogen to the Chesapeake Bay

Approximately one third of the nitrogen that enters the Chesapeake Bay comes from air pollution, and coal-fired power plants are the largest source of this air pollution.[19] Emissions from coal-burning utilities account for approximately 25% of the nitrogen oxide in the northeastern United States.[20] Focusing on the seven states that contribute the most nitrogen deposition to the Chesapeake Bay and its Watershed –

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[16] *Chesapeake 2000 Agreement*, *supra* note 5 at 5.

[17] *Id.* at 6.

[18] Chesapeake Bay Program, *Reducing Nutrient Pollution*, *at* http://www.chesapeakebay.net/nutr2.htm (last updated 10/04/2004).

[19] EPA National Estuary Program, *Air Pollution and Water Quality* (last updated 3/09/2006), *at* http://www.epa.gov/owow/estuaries/airdep.htm; Chesapeake Bay Program, *Air Pollution and the Chesapeake Bay*, slides titled *Sources of Nitrogen Loads to the Bay* and *Types of NOx Emission Sources from States that Contribute the Most Nitrogen Deposition to the Bay and Its Watershed*, *supra* note 14.

[20] Driscoll, *Nitrogen Pollution*, *supra* note 8 at 388.

Maryland, Virginia, Pennsylvania, New York, West Virginia, New Jersey, and Ohio – utilities contribute an even greater portion than the 25%,[21] approximately 38% of the airborne nitrogen from nitrogen oxide emission sources comes from utilities.[22] As described in section III, *infra*, installation of pollution controls as required by PSD would substantially reduce these emissions.

B. Excess Nitrogen in the Chesapeake Bay Creates Overwhelming Stresses on the Bay's Aquatic Life

The Chesapeake Bay and its tributaries suffer from low dissolved oxygen levels, which are a direct result of nitrogen and phosphorus pollution.[23] Nutrient loading is one of the most important causes of coastal eutrophication, which is the process of excess nutrients accelerating algae growth, leading to depletion of oxygen levels in water.[24] Eutrophication is one of

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[21] Nationally, coal-fired power plants contribute 93% of nitrogen oxide emissions attributable to the generation of electricity. Sierra Club, *Clean Air, Dirty Coal Power* (hereinafter *Clean Air, Dirty Coal Power*), *at* http://www.sierraclub.org/cleanair/factsheets/power.asp (last visited 7/17/2006).

[22] Chesapeake Bay Program, *Air Pollution and the Chesapeake Bay*, *supra* note 14.

[23] Because phosphorus is not emitted from power plants in significant amounts, its role in eutrophication is not discussed here.

[24] EPA, *How Nitrogen Oxides Affect the Way We Live and Breath* (September 1998), *available at* http://www.epa.gov/oar/noxfldr.pdf. *See generally*, Suzanne B. Bricker et al., National Oceanic and Atmospheric Administration, National Ocean Service, *National Estuarine Eutropication Assessment, Effects of Nutrient Enrichment in the Nation's Estuaries*, 1-2, 25 (September 1999) (hereinafter *Estuarine Eutrophication Assessment*), *available at* http://spo.nos.noaa.gov/projects/cads/nees/Eutro_Report.pdf.

the two most significant threats to the restoration of the Chesapeake Bay. In eutrophication, nitrogen from nitrogen oxide emissions and other sources converts into the reactive form of nitrate, and then supports the growth of plants and microbes.[25] Excess nitrates foster excessive growth of microscopic plants called phytoplankton, also known as "algae." Algae sink to the bottom of the Bay when they die, and their decomposition process removes oxygen from the water.[26] The animal life that traditionally filters the algae from the Bay, such as oysters or menhaden, cannot possibly consume all of the algae produced by excessive nitrogen loading, compounding the Bay's dissolved oxygen problem.[27]

"Overwhelmed" is the term now commonly used to describe the condition of the Bay's ecological system arising from nutrient pollution.[28] In 2002, 277 million pounds of nitrogen pollution entered the Chesapeake Bay.[29] Recent studies of the Bay's health starkly establish the overwhelming stresses this creates. In 2001, "half of the Chesapeake Bay's deeper waters had reduced dissolved oxygen concentrations,"

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[25] Driscoll, *Nitrogen Pollution, supra* note 8 at 357.

[26] Chesapeake Bay Program, *Air Pollution, at* http://www.chesapeakebay.net/air_pollution.htm (last updated 8/08/2005).

[27] Chesapeake Bay Program, *What is Dissolved Oxygen and Why is it Important to the Chesapeake Bay* (hereinafter *Dissolved Oxygen*) 3 (July 2004) *available at* http://www.chesapeakebay.net/pubs/doc-do_101_backgrounder.pdf; *cf.* Bricker, *Estuarine Eutrophical Assessment, supra* note 24 at 24.

[28] *See, e.g.*, Chesapeake Bay Program, *Dissolved Oxygen, supra* note 27.

[29] Chesapeake Bay Program, *Tributary Strategy Tools, Summary Loads and Land Use Acreage*, at http://www.chesapeakebay.net/tribtools.htm (last visited 7/19/2006).

stressing aquatic life, and sometimes reaching such low concentrations of oxygen that the waters become lethal to aquatic plants and animals.[30] In 2005, "the amount of water with no oxygen in the Bay's main stem was among the worst on record."[31] Moreover, the extent of the Bay's dead zone stretched further south than in most years, nearly reaching the mouth of Virginia's York River, one of the Bay's southern-most tributaries. Hence, controlling nitrogen oxide emissions from coal-fired power plants, as the CAA's PSD program was created to do, is vital to the health of the Bay.

C. Emissions From Coal-Fired Power Plants Contribute Significantly to Mercury Pollution in the Chesapeake Bay

Coal-fired power plants are the largest emitters of mercury in the United States.[32] Nationally, about one third of

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[30] EPA, *Technical Support Document*, *supra* note 5 at 19.

[31] Chesapeake Bay Foundation, *State of the Bay Report 2005*, 1-2, *available at* http://www.cbf.org/site/PageServer?pagename=sotb_2005_index.

[32] EPA, *Mercury Study Report to Congress*, EPA-453/R-98004a (U.S.Govt. Printing Office Wash., DC, Dec. 1997); David C. Evers, *Mercury Connections: The Extent and Effects of Mercury Pollution in Northeastern North America*, BioDiversity Research Institute 5 (2005) (hereinafter *Mercury Connections*), *available at* http://www.nwf.org/wildlife/pdfs/MercuryinWildlifeReport.pdf.; *see also* Dr. Mark Cohen, NOAA Air Resources Laboratory, *Atmospheric Mercury: Emissions, Transport/Fate, Source-Receptor Relationships*, 7, 9 (January 19-20, 2006) *available at* http://www.arl.noaa.gov/data/web/reports/cohen/cohen_niagara_first_talk_version_c.pdf.

mercury in the environment comes from these plants.[33] When coal is burned to produce electricity, trace amounts of mercury are released into the air. The mercury travels to earth through rain, snow, and dry particles.[34] Depending upon other environmental and chemical factors, the mercury is converted into methylmercury and accumulated by biological organisms including fish. Humans consume many of these fish species.

Studies have shown that, in general, mercury contamination is higher in areas closer to mercury sources, like power plants.[35] One study conducted for the Pennsylvania Department of Environmental Protection has shown that mercury levels were 47% higher in areas closer to power plants.[36] An EPA- funded study also found that 70% of the mercury collected at an Ohio River Valley monitoring site

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[33] Environmental Integrity Project, *Dirty Kilowatts: America's Most Polluting Power Plants* 1 (May 2005), *at* http://www.environmentalintegrity.org/pubs/Dirty%20Kilowatts%20FINAL.pdf.

[34] Sierra Club, *Clean Air, Dirty Coal Power*, *supra* note 21.

[35] Pennsylvania Department of Environmental Protection, *Data Collected Over Eight Years Shows Mercury Levels 47% Higher in Areas Near Power Plant* (May 31, 2006) (hereinafter *Mercury Levels Data*) at http://www.depweb.state.pa.us/news/cwp/view.asp?a=3&q=507034. Pennsylvania has an extensive network for analyzing the extent of mercury contamination in rain. *See* Todd Kuiken et al., National Wildlife Federation, *Cycle of Harm: Mercury's Pathway from Rain to Fish in the Environment*, 18 (2nd ed. May 2003) (hereinafter *Cycle of Harm*) *available at* http://www.nwf.org/nwfwebadmin/binaryVault/CycleofHarmFinalJ.pdf.

[36] Pennsylvania Department of Environmental Protection, *Mercury Levels Data*, *supra* note 35.

originated from nearby coal-burning industrial facilities.[37] Moreover, the closer a source of mercury is to a body of water, the more likely it is to contribute to mercury pollution in that body of water.[38] Not surprisingly, the thirteen coal-fired power plants in the proximity of the Chesapeake Bay contribute the most to mercury in the Bay. [39]

In Maryland, in heart of the Chesapeake Bay region, average mercury levels in rain were the highest of twelve states assessed in one recent study.[40] The top source of mercury pollution in that state is power plants, which contribute more than 40% of mercury emissions.[41] In another Chesapeake Bay state – Pennsylvania – the top ten mercury sources are all power plants.[42] The reduction of mercury emissions would be

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[37] *See* EPA, *Monitoring Needed to Assess Impact of EPA's Clean Air Mercury Rule on Potential Hotspots* Report No. 2006-P-00025, 12 (May 15, 2006), *available at* http://www.epa.gov/oig/reports/2006/20060515-2006-P-00025.pdf.

[38] Chesapeake Bay Foundation, *Mercury Deposition in the Chesapeake*, *at* http://www.cbf.org/site/DocServer/facsheet_final3.pdf?docID=3923 (hereinafter *Mercury Deposition*) (last visited 7/15/2006) (referencing Marc Cohen, NOAA Air Resources Lab, *Modeling the Fate and Transport of Mercury in the Chesapeake Bay,* 5/17/2004, *at* http://www.arl.noaa.gov/data/web/reports/cohen/20_Ches_Bay_talk.pdf (hereinafter *Mercury Fate and Transport*) (last visited 7/15/2006)).

[39] Chesapeake Bay Foundation, *Mercury Deposition*; *supra* note 38; *see also* Cohen, *Mercury Fate and Transport*, *supra* note 38.

[40] Kuiken, *Cycle of Harm*, *supra* note 35 at 22.

[41] Kristen Chossek Malecki et al., *The Chesapeake Bay Health Indicators Project: Linking Ecological and Human Health*, 24 *available at* www.cbf.org/site/DocServer/hopkins_0614report.pdf?docID=1923 (last visited 7/15/2006).

[42] Kuiken, *Cycle of Harm*, *supra* note 35 at 88.

an added benefit from installing emission control technology for nitrogen oxides and sulfur dioxide. *See infra* note 92.

D. Mercury Pollution in the Chesapeake Bay Poses a Significant Risk to Health, Economic Interests, and Wildlife

The Chesapeake Bay Region has some of the highest mercury levels in the nation.[43] According to one national study, mercury contamination in states including Maryland and Pennsylvania consistently exceeded EPA's "safe" standards for mercury in surface waters. In both of these states, over 90 % of rain samples revealed mercury levels greater than EPA's human health standard for mercury in lakes. In Maryland, the average rain sample collected was over five times above that standard.[44]

Elevated levels of mercury in the environment create a serious risk to the health of humans and wildlife, as well as to our economy.[45] Methylmercury[46] is "bioaccumaltive," which means that its concentration increases as wildlife, fish and people consume contaminated food. For example, fish tissue concentrations can reach levels that are over a million times higher than in surrounding water.[47] Thus, "a very low level of methylmercury in the environment can produce an extremely

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[43] Kuiken, *Cycle of Harm*, *supra* note 35 at 22, 67.

[44] Kuiken, *Cycle of Harm*, *supra* note 35 at 65, 89.

[45] National Wildlife Federation, *Mercury in the Mid-Atlantic: Are States Meeting the Challenge?* 1 (January 2005) (hereinafter *Mercury in the Mid-Atlantic*) *at* http://www.nwf.org/wildlife/pdfs/MercuryMidAtlantic.pdf.

[46] When mercury enters rivers and lakes, it is then converted to methylmercury, its most toxic form. *Id.* at 2.

[47] Kuiken, *Cycle of Harm*, *supra* note 35 at 10.

high body burden in animals at the tops of food chains. In the case of mercury, a little bit goes a long way."[48]

Consuming mercury contaminated fish presents severe danger to humans and wildlife. Mercury is a potent neurotoxin that damages the growth and function of the central nervous, cardiovascular, and reproductive systems.[49] In wildlife, mercury "is a reproductive hazard with harmful effects on species such as rainbow trout, zebra fish, mallard and American black ducks, loons and terns, otters and mink."[50] Adverse effects of exposure to methylmercury on wildlife "can include mortality (death), reduced fertility, slower growth and development and abnormal behavior that affects survival...."[51]

In humans, mercury's capacity to inhibit the growth of the developing brain makes it especially harmful to young children.[52] Ingestion of mercury can damage fetal nervous systems.[53] EPA research estimates that one in six women of

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[48] Evers, *Mercury Connections*, *supra* note 32 at 6.

[49] National Wildlife Federation, *Mercury in the Mid-Atlantic*, *supra* note 45 at 2.

[50] Susan O'Brien, *Study Released Today Reveals Dangerously High Mercury Levels in Maryland Rain* (C.B.F. May 23, 2003) *available at* www.cbf.org/site/News2?page=NewsArticle&id=6793.

[51] EPA, *Fate and Transport and Ecological Effects of Mercury* (last updated July 11, 2006), *at* http://www.epa.gov/mercury/eco.htm.

[52] Kuiken, *Cycle of Harm*, *supra* note 35 at 12.

[53] Department of Health and Human Services and Environmental Protection Agency, *What You Need to Know About Mercury in Fish and Shellfish* (March 2004), *at* http://www.cfsan.fda.gov/~dms/admehg3.html; *see also* EPA, *Mercury Health Effects* (hereinafter *Mercury Health Effects*), *at* http://www.epa.gov/mercury/effects.htm (last visited July 19, 2006).

childbearing age has blood-mercury levels that may put their children at risk of learning or developmental problems.[54]

Each of the States bordering the Chesapeake Bay has issued health advisories for the consumption of mercury contaminated fish.[55] Maryland has issued a statewide fish consumption advisory limiting consumption of rockfish, or striped bass, a major commercial and recreational species.[56] The prevalence of fish consumption advisories arising from mercury in fish is an increasing threat to the country's multi-billion dollar fishing industry[57] including the 500 million pounds of seafood produced by the Chesapeake Bay.

II. The Adirondacks and Catskills Are National Treasures that Merit the Protection Afforded by the PSD Program Limiting Pollutants from Power Plants

The two parks that are central to ADK's mission are the Adirondack Park and the Catskill Park. The six-million acre

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[54] Kathryn R. Mahaffey et al., *Blood Organic Mercury and Dietary Mercury Intake: National Health and Nutrition Examination Survey, 1999 and 2000*, 112 Environmental Health Perspectives, No. 5, 562, 565 (April 2004), *available at* http://www.ehponline.org/members/2003/6587/6587.pdf; *see also* EPA, *Mercury Health Effects*, *supra* note 53.

[55] EPA, *Fish Consumption Advisories for Mercury* (2004) *at* http://epa.gov/waterscience/fish/advisories/slides2004-1_files/slide6.html.

[56] *See* National Wildlife Federation, *Mercury in the Mid-Atlantic*, *supra* note 45 at 8; Maryland Dept. of the Environment, *Recommended Maximum Meals Each Year for Maryland Waters* (April 2006) *at* http://www.mde.state.md.us/assets/document/Fish_Consumption_Advisory_2006.pdf#Recommended_Meals_Per_Year.

[57] National Wildlife Federation, *Mercury in the Mid-Atlantic*, *supra* note 45 at 2.

Adirondack Park, created by the State of New York in 1892, is the largest publicly-protected area in the contiguous United States. It is larger than the Yellowstone, Everglades, Glacier, and Grand Canyon National Parks combined.[58] The Adirondack region has over 3,000 lakes, 30,000 miles of rivers and streams, and a large variety of habitats, including globally unique wetlands and old growth forests.[59] Approximately half of the Adirondack Park belongs to the people of New York State and is constitutionally protected as a "forever wild" forest preserve.[60] The remaining half of the park is private land, with about 130,000 people living in its 105 towns and villages.[61]

The Catskill Mountain region is often referred to as "America's First Wilderness" because scholars have traced the beginnings of the conservation movement to this area.[62] Established in 1904, the Catskill Park also is a combination of private and public land. Over one third of its 700,000 acres is public forest preserve land, protected as "forever wild" under the New York State Constitution. The Catskill region itself encompasses over 6,000 square miles of mountains, forests,

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[58] Adirondack Park Agency, *The Adirondack Park, at* http://www.apa.state.ny.us/About_Park/index.html (last visited 7/15/2006).

[59] *Id. at* http://www.apa.state.ny.us/About_Park/more_park.html (last visited 7/15/2006).

[60] *Id. at* http://www.apa.state.ny.us/About_Park/index.html (last visited 7/15/2006).

[61] *Id. at* http://www.apa.state.ny.us/About_Park/more_park.html (last visited 7/15/2006).

[62] The Catskill Center for Conservation and Development, *The Catskill Mountain Region, at* http://www.catskillcenter.org/region/region1.html (last visited 7/15/2006).

rivers and farmland.[63] This region has played a significant role in shaping the culture of the United States. It is the birthplace of American fly fishing, the backdrop for paintings by the Hudson River School of artists, and the home of the legendary Rip Van Winkle and the renowned naturalist and writer John Burroughs. The Catskill region was one of the first resort destinations in the United States, and serves as the watershed which provides water for millions of New Yorkers.[64] The Adirondack and Catskill Parks' mixtures of private lands, protected open space and recreational lands, wildlife, mountains and meadows, and diverse population is truly exceptional and must be preserved.

A. Emissions from Coal-Fired Power Plants Contribute to Acid Rain, Acid Deposition, and Smog in the Adirondacks and Catskills, and Pose a Significant Risk to Health, Economic Interests, Plants, and Wildlife

The Adirondacks and Catskills are downwind of numerous coal-burning power plants, whose emissions have damaged lakes and forests in these regions.[65] Coal-fired powerplants emit high levels of sulfur dioxides and nitrogen

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[63] *Id.*

[64] March 19, 2004 Proclamation of George E. Pataki, Governor, State of New York, *available at* http://www.catskillpark.org/history/proclamation.htm.

[65] Testimony of New York Attorney General Eliot Spitzer before the U.S. Environmental Protection Agency, March 31, 2003, (hereinafter *Spitzer Testimony*) *at* http://www.oag.state.ny.us/press/statements/usepa_cleanair_testimony.pdf.

oxides,[66] which are significant contributors to the formation of ozone, acid rain and acid deposition in the Adirondacks and Catskills. Emissions of sulfur dioxides and nitrogen oxides react with other compounds in the air to form acids which reach earth through rain, snow, fog, or as dry particles.[67] In the Northeastern United States, numerous acid sensitive forest and freshwater aquatic regions suffer from the ecological damage and health problems associated with acid rain and acid deposition.[68]

Forty-one percent of lakes in the Adirondacks and fifteen percent of lakes in New England suffer from chronic or episodic acidification. Elevated levels of nitric and sulfuric acid significantly reduce the water's acid-neutralizing capacity. This acidic condition reduces species diversity and the abundance of aquatic life.[69] As one example, acid deposition

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[66] Energy Information Administration, Office of Integrated Analysis and Forecasting, U.S. Department of Energy *Analysis of Strategies for Reducing Multiple Emissions from Power Plants: Sulfur Dioxide, Nitrogen Oxides, and Carbon Dioxide*, ix, xx (December 2000) (hereinafter *Strategies for Reducing Emissions*), *available at* http://tonto.eia.doe.gov/FTPROOT/service/oiaf0005.pdf; *see also supra* § I(A) (discussing nitrogen oxide emissions).

[67] *Strategies for Reducing Multiple Emissions*, *supra* note 66 at ix; EPA, *Health and Environmental Impacts of NOx* (hereinafter *Health and Environmental Impacts of NOx*), *at* http://www.epa.gov/air/urbanair/nox/hlth.html.

[68] Charles T. Driscoll et al., *Acid Rain Revisited: Advances in Scientific Understanding Since the Passage of the 1970 and 1990 Clean Air Act Amendments*, 4-5, Hubbard Brook Research Foundation (2001) (hereinafter *Acid Rain Revisited*) *available at* http://www.hubbardbrook.org/hbrf/publications/Acid_Rain_Revisited.pdf.

[69] *Id.* at 4, 11, 17.

sets off a deadly chain of events for fish. High levels of acidic deposition and high soil acidity, to which power plant emissions contribute, occur in the forests of the Adirondacks and Catskills. The combination of high soil acidity and high levels of acid deposition, which in turn contributes to low soil calcium levels, often fosters the release of aluminum from the soil into lakes and streams. Aluminum, in combination with high acidity levels in waters, is highly toxic. It disrupts the salt and water balance in fish, which can rupture blood cells and thicken fish blood, placing an enormous strain on fish hearts, and leading to deadly heart attacks.[70]

Acid deposition also has a deadly impact on other plant and animal life in the Northeast. Acid deposition accelerates leaching of calcium from soil,[71] which can adversely impact plant life by depleting soils of this nutrient, which is essential for plant growth. Elevated levels of acid in soil also cause nutrients to leach out of trees, which can cause a nutrient imbalance, reducing the ability to respond to environmental stresses such as cold weather, drought or insect infestation.[72] In turn, animals that depend on plant life for food suffer as poor soil conditions adversely impact plant growth. For example, red spruce trees at high elevations have suffered a serious decline as a result of acid deposition. Acidified soil causes

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[70] *Id.* at 11-12, 17.

[71] Charles T. Driscoll et al., *Acidic Deposition in the Northeastern United States: Sources and Inputs, Ecosystem Effects, and Management Strategies*, BioScience, 180, 185 (March 2001) (hereinafter *Acidic Deposition*), available *at* http://www.ingentaconnect.com/content/aibs/bio/2001/00000051/00000003/art00004;jsessionid=w8yzjh191elf.alice.

[72] *Id.* at 180, 187-188.

unusually high mortality rates for red spruce forests.[73] Since the 1960's, more than half of the large canopy red spruce trees in the Adirondacks and Vermont's Green Mountains, and one-quarter of these trees in New Hampshire's White Mountains have died. Acid deposition decreases red spruces' tolerance of cold temperatures, leading to tree damage or death.[74] This decline of red spruce trees is, in turn, detrimental to the unique and endangered species who rely on the tree for their habitat.[75]

Smog and decreased visibility are other problems exacerbated by emissions from coal-fired power plants. Ground level ozone, or smog, is formed when nitrogen oxides and volatile organic compounds react in the presence of sunlight.[76] This smog decreases visibility for hikers and others recreating in the region. In the Northeast mountains, on the haziest days, atmospheric sulfates contribute an estimated 70 % of the particulate matter that impairs visibility.[77] In addition, ozone exposure is detrimental to the health of some of the hikers. In one study with prolonged outdoor exercise, adult hikers in New Hampshire who were exposed to low-levels of particulate matter and ozone were likely to experience

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[73] Driscoll, *Acid Rain Revisited*, *supra* note 68 at 13.

[74] *Id.*

[75] Driscoll, *Acidic Deposition*, *supra* note 71 at 180, 187.

[76] EPA, *Health and Environmental Impacts of NOx*, *supra* note 67; *see also* EPA, *Ground-level Ozone: What is it? Where does it come from?* (last updated March 2, 2006) *at* http://www.epa.gov/air/urbanair/ozone/what.html.

[77] William C. Malm, National Park Service, *Introduction to Visibility*, 33 (May 1999) *available at* http://vista.cira.colostate.edu/improve/Education/intro_to_visibility.pdf.

significant effects on pulmonary function.[78] Detrimental human health effects resulting from ozone exposure include coughing, shortness of breath, and pain with inhalation.[79]

B. Mercury Pollution Poses a Significant Risk to Health, Economic Interests, and Wildlife in the Adirondacks and Catskills

The Adirondacks and Catskills are also downwind of many coal-fired power plants,[80] whose emissions of mercury contribute significantly to mercury pollution in those regions. Like the Chesapeake Bay, mercury pollution poses serious health and environmental problems for the lakes, rivers, and wildlife of this region. Ninety-six percent of the lakes in the Adirondack region and forty percent of the lakes in New Hampshire and Vermont exceed the recommended EPA action level for methylmercury in fish.[81] High mercury levels in fish from six reservoirs in the Catskills have prompted advisories

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[78] Susan A. Korrick et al., *Effects of Ozone and Other Pollutants on the Pulmonary Function of Adult Hikers*, 106 Environmental Health Perspectives No. 2, at 1-2 (February 1998) *available at* http://www.ehponline.org/docs/1998/106p93-99korrick/korrick-full.html.

[79] EPA, *Health and Environmental Impacts of Ground-level Ozone, at* http://www.epa.gov/air/urbanair/ozone/hlth.html (last visited 7/12/2006).

[80] *Spitzer Testimony, supra* note 65.

[81] Hubbard Brook Research Foundation, Testimony to the United States Environmental Protection Agency in Response to the EPA's 2004 Mercury Regulatory Package, 2, *available at* http://www.hubbardbrook.org/hbrf/HBRF_mercury_comments.pdf (last visited 7/14/2006).

that infants, children under the age of fifteen, and women of childbearing age not eat any fish from these reservoirs.[82]

The Northeast region also includes several mercury biological "hot spots," where high mercury levels have been recorded in fish, loons, eagles, and other animals.[83] Bioaccumulation of mercury in wildlife has reached alarming levels. According to one report, mercury is now present in about two-thirds of Adirondack loons at levels that negatively impact their reproductive capacity, posing a significant risk to their survival.[84] Likewise, approximately one third of otters and mink sampled in the northeastern United States had levels of mercury in their systems which challenge their reproductive success.[85] Problems associated with mercury accumulation appear not to be limited to surface waters and wildlife that use them: mercury is also accumulating in songbirds in nearby mountain forests, like the Bicknell's thrush– a terrestrial, insect eating songbird.[86] Based upon this data, as well as other information, scientists have concluded that wildlife in the

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[82] Alan White, *Mercury Advisories an Early Warning of Atmospheric Pollution in the Catskills*, 20 Kaatskill Life No 1, at 12 (Spring 2005).

[83] Evers, *Mercury Connections*, *supra* note 32 at 18.

[84] Jerry Jenkins et al., Adirondack Lakes Survey Corp., *Acid Rain in the Adirondacks: A Research Summary*, 173-74 (October 2005), *available at* http://www.adirondacklakessurvey.org/sosindex.htm.

[85] *Id.* at 174.

[86] Evers, *Mercury Connections*, *supra* note 32 at 16 (pertaining to birds in the western Maine mountains).

Catskill Mountains "are potentially at greater ecological risk for mercury accumulation" than other regions in the Northeast.[87]

III. Applying the CAA's PSD Permitting Program to Coal-Fired Power Plants that Undergo Physical Changes and Increase Emissions Will Help Save the Chesapeake Bay, Adirondacks, and Catskills

The approach adopted by the Fourth Circuit will allow dirty and aging power plants to make major renovations that prolong and increase their operations, including increasing the emission of harmful pollutants, without installing modern pollution control devices. This directly contravenes the text, structure, and purpose of the CAA's PSD program. The net result of the approach adopted by the Fourth Circuit would, rather than *limit* pollution increases, permit significant increases, which cannot be what Congress intended for the CAA, given its overarching goals and purposes. Aging, largely uncontrolled power plants already emit far more air pollution than those currently required to have pollution control equipment.[88] By requiring aging power plants to retrofit only when they undertake a physical or operational change that increases their hourly emissions rate, the Fourth Circuit's test

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[87] *Id.*

[88] A vast majority of the NOx and mercury emissions in the Chesapeake Bay Airshed comes from coal- fired power plants that do not have BACT. According to EPA data, in 2005, 155 out of 161 sources did not have BACT, and accounted for approximately 1.17 out of 1.20 million tons of NOx emitted. *See* EPA *Acid Rain Program, Preliminary Summary Data Reports*, *at* http://www.epa.gov/airmarkets/emissions/prelimarp/index.html (last visited 7/19/2006). Based upon EPA's 1999 data for mercury emissions, these same sources accounted for approximately 38 out of 39 thousand pounds of mercury emitted in that year. EPA, *Air Data, Generating Reports and Maps*, *at* http://www.epa.gov/air/data/reports.html (last visited 7/19/2006).

will allow these plants to emit excessive amounts of pollutants for greater periods of time, yielding an uncontrovertable net increase in pollutants. By contrast, Congress' statutory design anticipated that these dirty plants would either close, or when modified to extend their operating lives, be required to control and reduce their emissions. Allowing such plants to escape the statutory PSD obligations will not facilitate protection of the air in "areas of special national or regional natural, recreational, scenic, or historic value," 42 U.S.C. § 7470, but rather will impede such protection. *See also* Brief of the State of New York *et al* as *amici curiae* in Support of Petitioners.

The environmental implications of this issue are considerable. The number of operating power plants in this country between 30 and 50 years old is as high as 600. These plants "are up to ten times dirtier than new power plants built today."[89] According to one scientist who has studied the impacts of excessive nutrients in the Northeastern United States, combining aggressive controls of nitrogen from utilities with an aggressive mobile source reduction plan "would produce important reductions in estuarine loading."[90] One government study analyzing the emission reductions and price implications of NSR enforcement actions by the Justice Department and the states demonstrated that broadening these actions to address all non-NSR compliant electrical generating plants would potentially decrease nitrogen oxide emissions by 65% by 2020 and sulfur dioxide by 84% by 2020, as compared

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[89] Yekaterina Korastash, *EPA's New Regulatory Policy: Two Steps Back*, 5 N.C.J.L. & Tech. 295, 295 (Spring 2004); *see also* Sierra Club, *Clean Air, Dirty Coal Power*, *supra* note 21.

[90] Driscoll, *Nitrogen Pollution*, supra note 8 at 370.

to 2000 emission levels.[91] Moreover, the installation of modern pollution controls at coal-fired power plants under the PSD program would substantially reduce their mercury emissions.[92] Importantly, reducing mercury emissions may lead to a decrease in levels of contamination in downwind waters in only a matter of years,[93] which would significantly improve the health of the Chesapeake Bay and rivers and lakes in the Adirondacks and Catskills.

In contrast, affirming the approach adopted by the Fourth Circuit would frustrate commitments made by states surrounding the Chesapeake Bay, the District of Columbia, and the Federal government to reduce nitrogen loadings to the Bay through the Chesapeake Bay 2000 Agreement. If older plants can make changes that increase their emissions without going through the PSD permit process, these governments will not be able to live up to their commitments in this agreement. In 2003, the six Bay watershed states and the District of Columbia committed to reduce nitrogen from its 2000 level of 285 million pounds entering the Bay to no more than 175 million pounds per year – a reduction intended to foster conditions in the Bay that are healthier for the thousands of plants and

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[91] *Strategies for Reducing Emissions*, *supra* note 66 at 59-63.

[92] *See* EPA, *Controlling Power Plant Emissions: Controlling Mercury with Existing Controls*, *at* http://www.epa.gov/mercury/control_emissions/tech_exist.htm (last updated July 5, 2006); *cf.* National Wildlife Federation, *Controlling Mercury from Power Plants: Current State of Technology* (April 2006) *available at* www.nwf.org/wildlife/pdfs/MercuryPollutionControls.pdf (terms of the CAA's PSD program themselves do not specifically require controls of mercury, however, the technology that they do require produces the "co benefit" of significant mercury reductions).

[93] Kuiken, *Cycle of Harm*, *supra* note 35 at 11.

animals living in its ecosystem.[94] But as of 2004, annual nitrogen inputs to the Bay were 2.5 times *greater* than the 80 million kilogram level needed to meet the terms of the Chesapeake 2000 Agreement.[95] Air emissions from power plants make up a large part of that number. *See supra* § I(A).

Likewise, controlling pollution from power plants will reap important environmental benefits in the Adirondacks and Catskills. Added to the benefits of decreasing mercury emissions, reducing power plant pollutant emissions will also help reduce the acidification of lakes and rivers that is so harmful to plant and animal life in the Adirondacks and Catskills. Reducing emissions of pollutants will also improve visibility and human health by decreasing ozone.

Aside from these important direct environmental benefits to the Chesapeake Bay, Adirondacks, and Catskills from reducing power plant emissions, other benefits should also be considered. Studies have shown that the economic benefits of reducing pollutants like mercury and nitrogen oxide far outweigh their costs.[96]

CONCLUSION

Congress, in enacting the PSD program as part of the

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[94] Chesapeake Bay Program, *Simulated Nutrient and Sediment Load Reductions (1985-2004), at* http://www.chesapeakebay.net/status.cfm?SID=186 (last visited 7/17/2006).

[95] *Ecological Effects*, *supra* note 6 at 20.

[96] National Wildlife Federation, *Study Finds Maryland Health Air Act Will Save Lives, Benefit Economy* (March 6, 2006), *available at* http://www.nwf.org/news/story.cfm?pageId=CFD3DC21-C42A-E6C7-D22B4652CBA6DC3C.

CAA, declared that one of its purposes is to "preserve, protect, and enhance the air quality in . . . areas of special national or regional natural, recreational, scenic, or historic value." 42 U.S.C. § 7470(2). The Chesapeake Bay, the Adirondacks, and the Catskills are undoubtedly such special areas. For years, they have suffered multiple harmful environmental effects of excessive emissions of mercury, nitrogen oxides, and sulfur dioxides from coal-burning power plants. Implementing the PSD program to require these plants to control their harmful emissions when they make changes that increase actual annual emissions is necessary to assure that these special areas are not further damaged, but rather are preserved, protected, and enhanced, as Congress intended.

The Chesapeake Bay Foundation and the Adirondack Mountain Club respectfully request that the Court reverse the decision of the Fourth Circuit and apply the PSD program to projected annual emission increases, to promote clean air and protect the environment.

Respectfully submitted,

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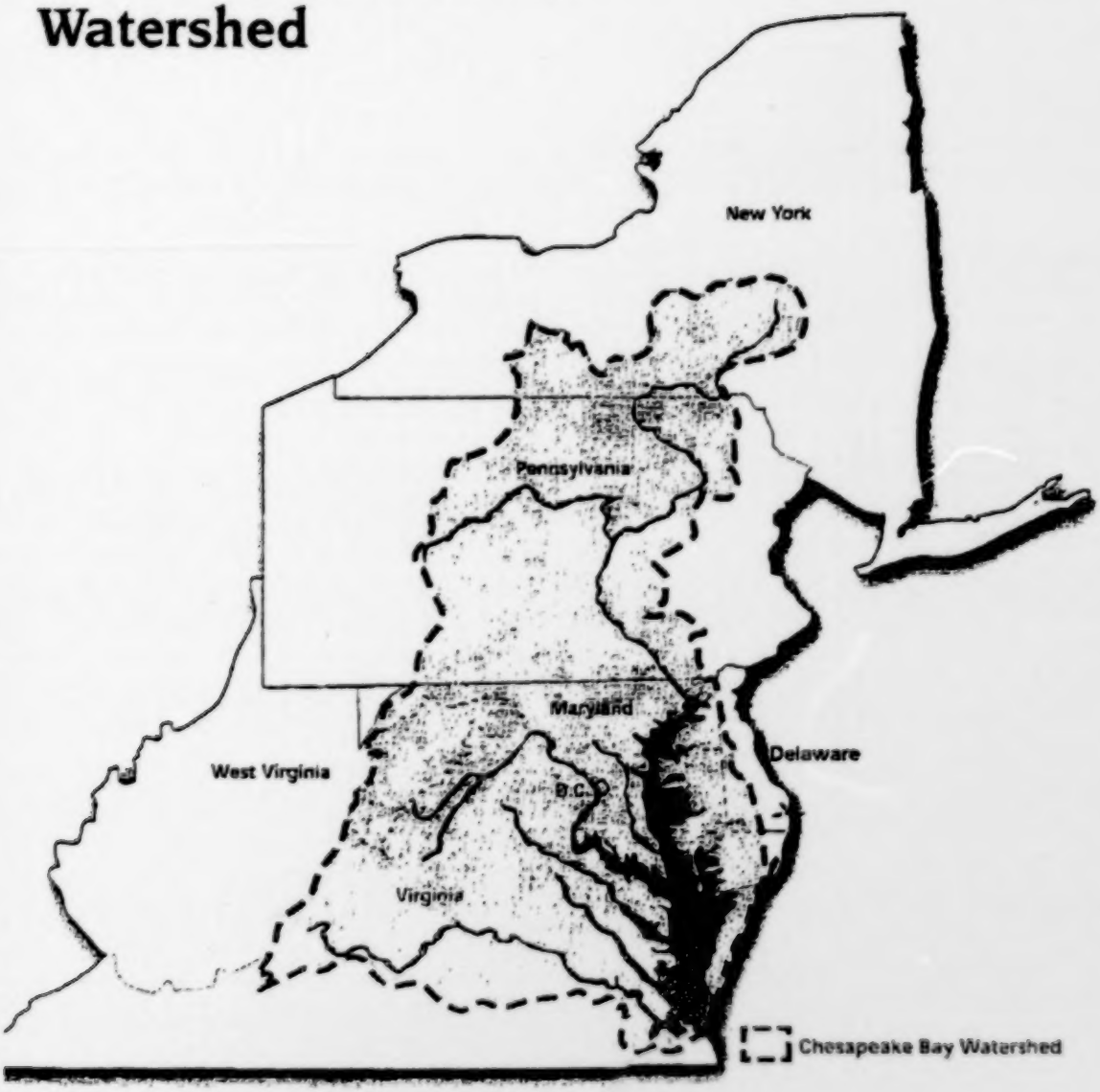
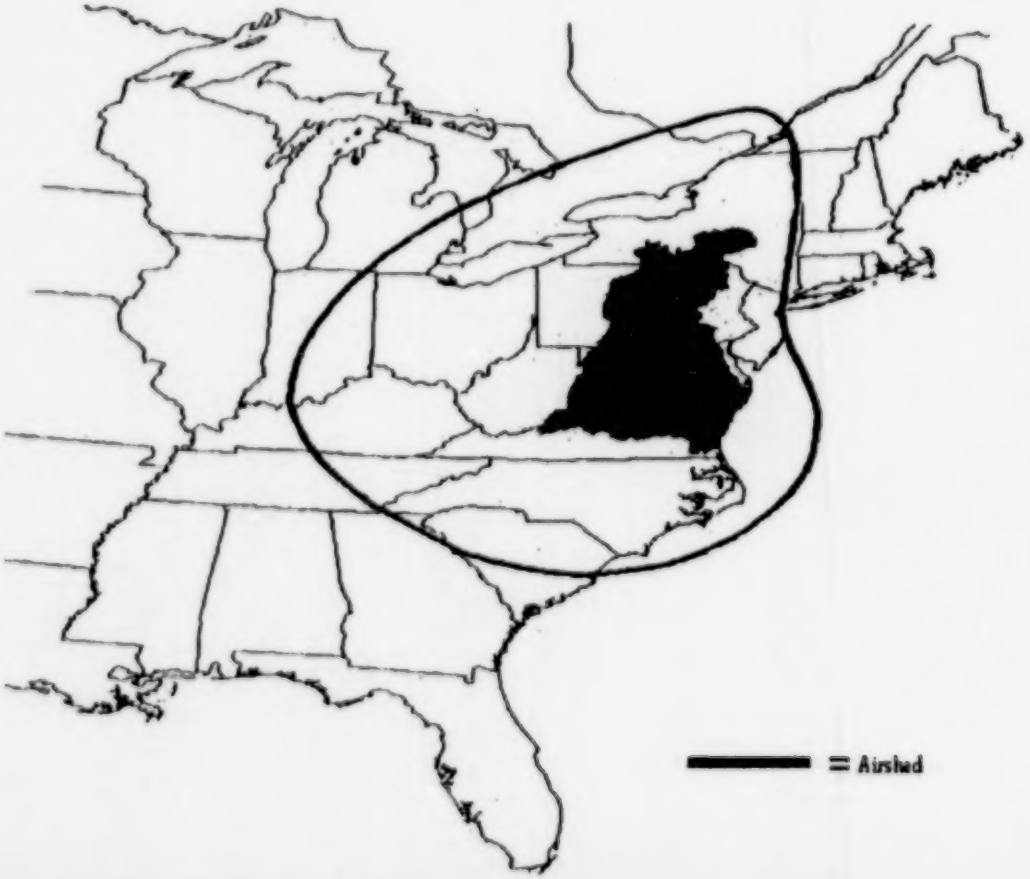
The Chesapeake Bay Watershed



Area of NOx Emissions that contribute Nitrogen Deposition to the Bay and its Watershed



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ENVIRONMENTAL DEFENSE, ET AL.,
Petitioners,

v.

DUKE ENERGY CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF ELECTRIC UTILITY INDUSTRY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT DUKE ENERGY CORPORATION

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Helvering v. Stockholms Enskilda Bank, 293 U.S. 84 (1934)	16
IBP, Inc. v. Alvarez, 126 S. Ct. 514 (2005)	15
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Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982)	18
Nat'l Labor Relations Bd. v. Bell Aerospace Co., 416 U.S. 267 (1974)	25

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Sierra Club v. Georgia Power Co., 180 F.3d 1309 (11th Cir. 1999)	2
Sinclair Ref. Co. v. Atkinson, 370 U.S. 195 (1962), *overruled in part on other grounds by Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970)	20
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Train v. Natural Resource Defense Council, Inc., 421 U.S. 60 (1975)	12
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FEDERAL REGISTER — Page

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40 Fed. Reg. 58,416 (Dec. 16, 1975) 19, 23, 30
43 Fed. Reg. 26,388 (June 19, 1978) 26
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H.R. Rep. No. 101-490 pt.1 (1990) 10
123 Cong. Rec. 36,252 (1977) 20

OTHER AUTHORITIES

Air Quality and Electricity: Enforcing New Source Review, Larry B. Parker and John E. Blodgett, CRS Resources, Science, and Industry Division, RL30432 (Jan. 31, 2000), *available at* ncseonline.org/nle/crsreports/air/air-35.cfm 6, 8

Department of Energy, Energy Information Administration, Annual Energy Review 2005, *available at* www.eia.doe.gov/emeu/aer/pdf/aer.pdf 1

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EEI Comments on 2005 Emission Increase Rule, EPA-HQ-OAR-2005-0163-0122.1 (Feb. 17, 2006) 8

National Acid Precipitation Assessment Program Report to Congress: An Integrated Assessment, *available at* www.napap.noaa.gov/reports 8

NORMAN J. SINGER, STATUTES & STATUTORY CONSTRUCTION § 53:01 (6th ed. 2000) 20

Regulatory Impact Analysis of the Clean Air Interstate Rule: Final Report, 2060-AJ65 (Mar. 1, 2005), *available at* www.epa.gov/interstateairquality/impact.htm#economic 8

Statement of Steve Johnson, Acting EPA Administrator (Mar. 10, 2005), *available at* www.epa.gov/interstateairquality/ 9

Testimony of William F. Tyndall, before the Subcommittee on Clean Air, Wetlands, Private Property, and Nuclear Safety, Committee on Environmental Environment and Public Works, United States Senate (Oct. 14, 1999), *available at* epw.senate.gov/107th/tyn_1014.htm 8

U.S. Environmental Protection Agency, Air Emissions Trends—Continued Progress Through 2005, *available at* www.epa.gov/airtrends/2006/econ-emissions.html 7

INTERESTS OF *AMICI CURIAE*

This case is not just about one utility company. The theory of the Clean Air Act advanced by Petitioners would subject a large segment of the electric generating capacity in this country—nearly 70% of it[1]—to costly, duplicative, and potentially debilitating regulatory review requirements. And, despite Petitioners' rhetoric, such action is not necessary to protect public health and the environment—the nation's air quality is improving and will continue to do so without accepting Petitioners' position on New Source Review ("NSR").

This brief is filed by American Electric Power Company, Inc. ("AEP"), Edison Electric Institute ("EEI"), Southern Company, and Utility Air Regulatory Group ("UARG") (collectively, "Electric Utilities")—entities with a vital interest in *both* providing the nation with a reliable supply of electricity *and* protecting and improving air quality.[2] AEP and Southern Company are two of the largest electric utility systems in the United States. AEP owns nearly 36,000 megawatts of electric generating capacity and serves a 197,500 square-mile service territory in Arkansas, Indiana, Kentucky, Louisiana, Michigan, Ohio, Oklahoma, Tennessee, Texas, Virginia, and West Virginia. Southern Company owns more than 40,000 megawatts of electric generating capacity and serves a 120,000 square-mile service territory in Alabama, Florida, Georgia, and Mississippi. EEI is a trade association of United States shareholder-owned electric utility companies, international affiliates, and industry associates worldwide. UARG is a non-profit, unincorporated trade association of individual

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[1] About 50% of the nation's electricity comes from coal-burning units and about 18% from natural gas units, all of which could be subject to these requirements. *See* Department of Energy, Energy Information Administration, Annual Energy Review 2005, Table 8.2a, at 228, *available at* www.eia.doe.gov/emeu/aer/pdf/aer.pdf (last accessed Sept. 11, 2006).

[2] All parties have consented to the filing of this brief. No person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of this brief.

electric utilities located throughout the country and of related industry trade associations.

Electric Utilities and their members operate steam electric generating units that produce electricity for individuals, businesses, and government entities across the country. These units are complicated machines consisting of thousands of separate parts and components operated in an integrated fashion to produce electricity. The failure of these parts—from the smallest valve to the largest boiler components—can result in unsafe and unreliable operation, including forced (emergency) shutdown.

A reliable and affordable supply of electric power is critical to public health and welfare.[3] Utilities are under both legal and practical obligations to maintain power plants and equipment at optimum levels of reliability and efficiency. As a result, the utility industry promptly repairs and replaces deteriorating and broken components to assure an uninterrupted supply of electricity to the public.

Petitioners claim that repair and replacement activities, like those Duke Energy did, are "major modifications" that trigger NSR's lengthy and burdensome permitting process solely because they maintain the continued availability and reliability of the units. That is not the law, and it is bad policy, too.

Congress enacted NSR—*New* Source Review[4]—to address new emissions *capacity*, not to delay or to discourage

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[3] *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 306 (1997) ("[S]tate regulation of . . . sales to consumers serves important interests in health and safety in fairly obvious ways, in that . . . individual buyers . . . are not frozen out of their houses in the cold months."); *Sierra Club v. Georgia Power Co.*, 180 F.3d 1309, 1311 (11th Cir. 1999) ("[A] steady supply of electricity during the summer months, especially in the form of air conditioning to the elderly, hospitals and day care centers, is critical.").

[4] NSR is called Prevention of Significant Deterioration ("PSD") in areas that meet air quality standards and Non-attainment New Source Review ("NNSR") in areas that do not. For simplicity's sake, this brief uses the general term "NSR" except where a distinction is appropriate.

maintenance and repair work at existing units. Congress explained in 1977 that NSR was being enacted in order to create a "mechanism [ ] to assure that before *new* or *expanded* facilities are permitted, a State demonstrate that these facilities can be accommodated within its overall plan to provide for attainment of air quality standards." S. Rep. No. 95-127, at 55 (May 10, 1977) (emphasis added).[5] To implement its intent, Congress chose to use an existing term with an established meaning—"modification"—to refer to the types of activity that would subject an existing source to NSR. That term meant at the time, and means today, a change that increases a unit's intrinsic capability to emit pollution (*i.e.*, its hourly emissions rate), not one that maintains the unit's ability to operate in the future as it was constructed and permitted to do. The Fourth Circuit's decision properly recognizes this distinction.

Not only does Petitioners' theory fly in the face of congressional intent, it makes no practical sense. Because existing facilities are extensively regulated under the Clean Air Act apart from NSR, and given the myriad factors that affect how an existing facility is operated (including customer demand, economic factors, weather, the availability of other units, grid congestion, and fuel costs), EPA has never defined "modification" based on variations in hours of operation within permitted capacity. Petitioners' focus on hours of operation thus ignores the practical reality of running a complex, integrated electric generating and transmission system.

Further, Petitioners' theory would have potentially debilitating effects on a significant portion of the nation's electric generating capacity. The activities being challenged by Petitioners are performed every year at power plants—both

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[5] This 1977 Senate Report used the term "expanded" synonymously with "modified" in its discussion of the NNSR provisions of the reported bill—Senate Bill 252, § 13—which required pre-construction review for newly "constructed or modified" major emitting facilities.

old and new—across the country. Because NSR is a pre-construction permitting program (*i.e.*, a covered activity cannot be undertaken until a permit is obtained) and one round of permitting can last for years,[6] critical energy facilities would either be shut down or in a state of perpetual permitting if Petitioners had their way.[7] Congress clearly did not intend to condition the reliability of the country's electricity supply on a multi-year, overlapping permitting process.

SUMMARY OF THE ARGUMENT

I. The electric utility industry has invested and will continue to invest billions of dollars to decrease air emissions from existing power plants and to comply with non-NSR provisions of the Clean Air Act. This investment has paid off—air emissions in this country have decreased dramatically and air quality has improved. Foisting Petitioners' theory of NSR onto existing sources is unnecessary to continue these improvements and would, in fact, be counterproductive. NSR is a program for controlling emissions *growth* from *new* sources. It is an inefficient mechanism for achieving significant emission reductions from existing sources.

II. Congress expressly directed that the term "modification" mean the same under NSR as under the existing New Source Performance Standards ("NSPS") program. In doing so, Congress focused NSR on "new" or "expanded" facilities, not existing ones that do not increase their constructed and permitted capacity to emit pollution. Given Congress' clear direction, EPA is prohibited from interpreting "modification"

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[6] Just the NSR permitting process itself (not the work) can take years and cost hundreds of thousands of dollars. *See Alaska Dep't of Envtl. Conservation v. Envtl. Prot. Agency*, 540 U.S. 461, 516-17 (2004) (Kennedy, J., dissenting).

[7] The sheer number of allegations made against the industry proves this point. For example, in *United States v. Ohio Edison Co.*, the government alleged that a single plant should have applied for eleven NSR permits in a fourteen-year span. 276 F. Supp. 2d 829, 823-33 (S.D. Ohio 2003).

differently for the two programs. The Fourth Circuit's decision to this effect thus follows the plain language of the statute and, in addition, is supported by well-established canons of statutory construction. Because Congressional intent here is clear, that is the end of the matter.

III. All of Petitioners' arguments to the contrary easily yield upon scrutiny. For example, Petitioners' argument that Congress could not have intended to incorporate the NSPS regulatory definition of "modification" into the statutory NSR provisions is based on a misreading of the regulatory and legislative record. Specifically, in 1977 there was but one single meaning of "modification" under the NSPS and the NSR rules in force at the time: it was (and is) a change that increases a facility's maximum emissions rate, unaffected by hours of operation. The unique backdrop of the 1977 amendments—where Congress had before it EPA's existing NSR regulatory program and reviewed it provision by provision, adopting some and changing others—provides irrefutable evidence of Congress' intent. Under the statutory NSR program, Congress wanted "modification" to mean the same as under those pre-existing EPA rules. This conclusion is confirmed by EPA's own contemporaneous interpretation of the statute, as set forth in the very first NSR rules enacted after the 1977 amendments—an interpretation that EPA has reaffirmed over the years.

IV. Finally, contrary to Petitioners' claim, the hourly rate test used to trigger both NSPS and NSR *is* based on "actual" emissions, as EPA has explained. More fundamentally, that test has been in the NSPS rules for thirty-five years. To suggest now, as do Petitioners, that the NSR rules cannot use the same test for "modification" as NSPS, when the statute plainly requires the same definition of that term in NSR as in NSPS, defies common sense.

ARGUMENT

I. AIR QUALITY IS IMPROVING

Despite the rhetoric of Petitioners and their supporters,[8] reversal of the Fourth Circuit is not the *sine qua non* to decreasing emissions and improving the nation's air quality. Irrespective of the outcome here, the trend of decreased emissions and improved air quality that has occurred over the past three decades will continue apace. As EPA has acknowledged, NSR is not intended as a driver for decreasing emissions from existing sources:

> [T]he primary purpose of the major NSR program is *not* to reduce emissions, but to balance the need for environmental protection and economic growth. *That is, the goal of major NSR is to minimize emissions increases from new source growth.*

70 Fed. Reg. 61,081, 61,088/1 (Oct. 20, 2005) (emphasis added). EPA is not alone in this view. Prior to this suit, the Congressional Research Service explained that NSR was not aimed at emission reductions from existing sources, nor is it an effective means of achieving such reductions.[9]

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[8] *See, e.g.*, Pet. Br. at 26 (claiming the Fourth Circuit "immunized" modernization projects from review, to the determent of local air quality); New York Br. at 3 (claiming the Fourth Circuit's decision will have "dire ramifications" to public health); STAPPA & ALAPCO Br. at 5 (asserting the Fourth Circuit's decision will "exempt all . . . existing industrial sources" from installing modern pollution controls).

[9] *See Air Quality and Electricity: Enforcing New Source Review*, Larry B. Parker and John E. Blodgett, CRS Resources, Science, and Industry Division, RL30432 (Jan. 31, 2000), *available at* ncseonline.org/nle/crsreports/air/air-35.cfm (last accessed Sept. 11, 2006) [hereinafter *CRS Report*] ("NSR was one approach that the Clean Air Act took to control emissions from existing sources, but arguably more efficient and more effective methods to ensure declining emissions from existing sources over time have been developed since NSR provisions were added to the CAA in 1977. For example, title IV of the CAA, enacted in 1990, explicitly and substantially reduces SO_2, and NO_x emissions from existing utility plants. . . . The 'cap and trade' program has had 100% compliance

Simply put, NSR is *not*, and was never intended to be, an emissions reduction program; it is a growth management program. Substantial emission reductions have been and will continue to be achieved by subjecting existing sources (like Duke Energy's) to a host of *other* non-NSR Clean Air Act programs, including: state implementation plans that are specifically designed to meet or exceed federal air quality standards, 42 U.S.C. § 7410; visibility protection programs, *id.* §§ 7491-92;[10] the Title IV Acid Rain Program, *id.* §§ 7651-7651o; regional NO_x trading programs ("NO_x SIP call"), 63 Fed. Reg. 57,356 (Oct. 27, 1998); the Clean Air Mercury Rule ("CAMR"), 70 Fed. Reg. 28,606 (May 18, 2005); and the Clean Air Interstate Rule ("CAIR"), 70 Fed. Reg. 25,162 (May 12, 2005)—all of which are more efficient at reducing emissions and improving air quality than NSR. *See* 70 Fed. Reg. at 61,083/2 (describing "the substantial emissions reductions from other CAA requirements that are more efficient than major NSR"). These are the programs that effectively control emissions from existing sources yet Petitioners act as if they do not exist.

These non-NSR programs are working. Under them, the utility industry has dramatically reduced emissions, while at the same time satisfying the steadily increasing American appetite for electricity. Recently, EPA documented this progress in a report entitled "Air Emissions Trends—Continued Progress Through 2005." According to EPA's findings, since 1970, air emissions have decreased 53%. At the same time, the country's gross domestic product has risen 195%, and energy consumption has increased 48%.[11] EPA recognizes

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(indeed, substantial over-compliance); the implicit logic of EPA's lawsuits suggests NSR's compliance has been near zero.").

[10] *See also* 64 Fed. Reg. 35,713 (July 1, 1999) (Regional Haze Regulations); 70 Fed. Reg. 39,104 (July 6, 2005) (Clean Air Visibility Rule).

[11] U.S. Environmental Protection Agency, Air Emissions Trends—Continued Progress Through 2005, www.epa.gov/airtrends/2006/econ-emissions.html (last accessed Sept. 11, 2006).

that the "reductions in national emissions for the utility sector are especially significant considering that national capacity continues to increase." 70 Fed. Reg. at 61,087. Going forward, the utility industry is on track to reduce its emission rates by about 90% (compared to 1980) upon implementation of CAIR, CAMR, and the Clean Air Visibility Rule.[12] The fact is, the nation's air is getting cleaner—and it has nothing to do with NSR. *See CRS Report* ("[T]itle IV reduced more SO_2 emissions from coal-fired electric generating facilities in its first year of implementation (1995) than NSR has in its 20 years of existence.").

These reductions have not come without a price. The utility industry has invested tens of billions of dollars in advanced, state-of-the-art air pollution control technologies over the past thirty years. For example, between 1976 and 1996, electric utilities spent over $32 billion for air pollution control equipment.[13] The utility industry continues to spend billions of dollars just to comply with the Acid Rain Program.[14] The annual costs to comply with CAIR alone are projected to be $2.9 billion by 2010 and $3.7 billion by 2015.[15] EPA estimates the annual costs of CAMR to the

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[12] *See* EEI Comments on 2005 Emission Increase Rule, EPA-HQ-OAR-2005-0163-0122.1 (Feb. 17, 2006).

[13] *See* Testimony of William F. Tyndall, before the Subcommittee on Clean Air, Wetlands, Private Property, and Nuclear Safety, Committee on Environmental Environment and Public Works, United States Senate (Oct. 14, 1999), *available at* epw.senate.gov/107th/tyn_1014.htm (last accessed Sept. 11, 2006).

[14] *See* National Acid Precipitation Assessment Program Report to Congress: An Integrated Assessment, at 13, *available at* www.napap.noaa.gov/reports (last accessed Sept. 11, 2006).

[15] *See* Regulatory Impact Analysis of the Clean Air Interstate Rule: Final Report, 2060-AJ65 (Mar. 1, 2005), *available at* www.epa.gov/interstateairquality/impact.htm#economic (last accessed Sept. 11, 2006).

power industry to be $160 million in 2010, $100 million in 2015, and $750 million in 2020.[16]

Importantly, this lawsuit and others like it primarily involve plants located in areas that are *in attainment* for regulated pollutants—*i.e.*, where air quality meets or exceeds the National Ambient Air Quality Standards ("NAAQS") set by EPA to protect public health and the environment.[17] Not only will the air quality in these areas be protected and improved by existing non-NSR regulatory programs, but the air quality in non-attainment areas will as well. For example, in 1998, EPA promulgated rules (known as the "NO_x SIP Call") that required twenty-one states in the eastern United States (including North and South Carolina where Duke operates) to reduce NO_x emissions that contributed to non-attainment in downwind states. The NO_x SIP Call has resulted in the installation of a large number of selective catalytic reduction devices ("SCRs") on existing coal-fired boilers. *See* 70 Fed. Reg. at 61,084/2. Further, in May 2005, EPA promulgated CAIR to reduce interstate transport of both SO_2 and NO_x. CAIR, according to EPA, "will result in the largest pollution reductions and health benefits of any air rule in more than a decade."[18] CAIR does so by establishing statewide emission reduction requirements for SO_2 and NO_x in the eastern United States, which EPA expects to be achieved through the installation of scrubbers and SCRs on many existing sources. *See id.* at 61,085/2. EPA estimates CAIR will result in emissions reductions from these sources

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[16] *See* 70 Fed. Reg. at 28,639.

[17] And, if EPA ever concludes that the existing NAAQS are inadequate to protect human health, it has the power and obligation to revise them through rulemaking. *See* 42 U.S.C. § 7409.

[18] Statement of Steve Johnson, Acting EPA Administrator (Mar. 10, 2005), *available at* www.epa.gov/interstateairquality/ (last accessed Sept. 11, 2006).

of roughly 73 percent for SO_2 and 61 percent for NO_x *from 2003 levels.*[19]

The circumstances surrounding Congress' adoption of just one of these non-NSR programs—the Acid Rain Program—solidifies the fact that Congress never envisioned NSR as a driver for the kind of significant emissions reductions Petitioners say it must produce. The Acid Rain Program was added to the Clean Air Act in 1990, more than a decade after Congress passed NSR in 1977. Pub. L. No. 101-549, 104 Stat. 2584 (codified at 42 U.S.C. §§ 7651-7651o). The stated purpose of the legislation was to require significant emissions reductions from *existing* coal-fired power plants, the so-called "grandfathered" units. *See* 42 U.S.C. § 7651. Congress referenced many of these units by name and established in the statute new emissions limits reflecting a fundamental premise that existing permitting requirements (*i.e.*, NSR) could not be expected to achieve the desired emissions reductions. *Id.* § 7651c. In fact, EPA itself told Congress that new legislation was needed to deal with existing sources:

> Some have suggested that the existing law is adequate to deal with interstate air pollution. *The most persuasive argument that it is not, is the EPA's own analysis of the options available under existing law.*

S. Rep. No. 101-228, at 288-89 (1989), *reprinted in* 1990 U.S.C.C.A.N. 3672-73 (emphasis added); *see also* H.R. Rep. No. 101-490 pt.1 at 362-64 (1990).[20] Following EPA's advice,

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[19] *See* 70 Fed. Reg. at 61,085/2-3.

[20] In *United States v. Cinergy Corp.*, No. 06-1224, slip op. at 5 (7th Cir. Aug. 17, 2006), the Seventh Circuit said, without any citation, that "there is an expectation that old plants will wear out and be replaced by new ones that will be subject" to more stringent new source controls. The lack of citation is not surprising, given that nothing in the statutory language indicates such an "expectation." If there is any "expectation" reflected in the statute, it is that Congress thought that something other than NSR was required to mitigate acid-rain forming pollutants because the law does not require existing plants to retire at any particular age.

Congress enacted Title IV to make specific power plants (including the very ones at issue here) reduce SO_2 emissions by 10 million tons per year and NO_x emissions by 2 million tons per year from 1980 levels. *See* 42 U.S.C. § 7651(b).

It is against this backdrop that Petitioners argue Congress intended some radically new and different meaning be given the term "modification" when it enacted NSR in 1977 that would cure the nation's alleged air quality woes. Forget for a moment that Congress said explicitly in the statute that "modification" was to mean the same as it always had under the Clean Air Act (discussed below)—Petitioners' proposition does not square with the monumental efforts that Congress, EPA, and the utility industry have undertaken to reduce emissions from existing sources. Petitioners would have this Court believe, for example, that at the same time Congress enacted Title IV in 1990 (to achieve reductions from power plants that existing law was not "adequate to deal with"), both EPA and Congress knew that these same plants should have been "un-grandfathered" under the NSR "modification" rule the first time a repair was made to maintain reliability, and then repeatedly with every subsequent repair. Their claim simply does not comport with the facts—or common sense.

Title IV and the other non-NSR programs are doing exactly what EPA and Congress intended—dramatically reducing emissions from existing sources. This progress should be allowed to continue without disruption. Petitioners' view of the Clean Air Act would, as a practical matter, elevate NSR above these other more effective and efficient programs. What was intended as a mechanism to control emissions growth from new sources, would, under Petitioners' view, be a dominant driver of emissions reductions from existing sources. Given its lengthy and costly permitting process and the realities of electricity generation, *supra* at 1-4, NSR is ill-suited to this task.

This is the crux of the dispute here between the parties. Under Petitioners' interpretation, Congress enacted the ultimate command-and-control program in 1977. Under their view of NSR, *every* existing electric generating unit should have long ago shut down or installed new source emissions controls, regardless of cost or whether such controls are even needed to meet or maintain EPA-established air quality standards. This is utterly incompatible with the major policy decisions that Congress and EPA have made for controlling utility industry emissions—namely, controls as determined by the states to meet local air quality concerns, *see Train v. Natural Resource Defense Council, Inc.*, 421 U.S. 60 (1975), and market-based cap-and-trade programs to address broader regional and national concerns, *see, e.g.*, 42 U.S.C. §§ 7651-7651o; 63 Fed. Reg. at 57,356. Petitioners' argument should be rejected because, as EPA put it, an interpretation of the modification provision under which "all major facilities eventually trigger NSR . . . cannot be squared with the plain language of the CAA." 68 Fed. Reg. 61,269, 61,273/2 (Oct. 27, 2003).

II. "MODIFICATION" IS A TERM OF ART WITH ONE MEANING UNDER THE CLEAN AIR ACT

The Fourth Circuit properly concluded that Congress intended NSR and NSPS to share a common definition of "modification" and that EPA must interpret its NSR regulations accordingly.[21]

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[21] As the Fourth Circuit and the district court explained, EPA's NSR rules were, contemporaneously with their promulgation, interpreted consistent with the existing NSPS rules. Pet. App. 15a n.7. It is, therefore, not a matter of the rules' validity, but of their interpretation consistent with congressional intent. *See United States v. Giancola*, 783 F.2d 1549, 1552 (11th Cir. 1986) ("[Courts] do not construe a regulation in a manner that would place it in conflict with the statute by which it is authorized . . . .").

A. Congress Directed EPA to Use the Same Definition of "Modification" Under NSR as Under NSPS

There is but one statutory definition of "modification" for all of the Clean Air Act's new source programs.

> The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

42 U.S.C. § 7411(a)(4). This definition was formulated by Congress in 1970 when it enacted the first of the new source programs under the Clean Air Act—the New Source Performance Standards or "NSPS." It is the only definition of "modification" Congress has ever written for the statute's new source programs. From the beginning, this single definition has applied as a trigger both to the NSPS technology-based standards *and* new source review, both of which were required in the 1970 amendments (Petitioners conveniently ignore this latter point). *See id.* §§ 7410(a)(2)(D), (a)(4) (1970) (establishing a program for the review of the location of new sources, prior to their "construction or modification"). The 1977 amendments continued to use this single term and definition to trigger *both* the control technology and pre-construction review portions of the new source programs.

When it enacted the statutory NSR program in 1977, Congress did not rewrite the definition of "modification" or change it in any way to reflect any different goals or purposes. Nor did Congress simply repeat the statutory NSPS definition of "modification" in the new NSR provisions. Instead, Congress made the deliberate choice to cross-reference and incorporate the existing definition of "modification" and specified that the term shall have but one *meaning*. *Id.* § 7479(2)(C) ("The term 'construction' . . . includes the modification (as defined in section 7411(a) . . . ."); *id.* § 7501(4) ("The terms 'modifications' and 'modi-

fied' mean the same as the term 'modification' as used in section 7411(a)(4) of this title.").

The text of the Clean Air Act is clear and unambiguous: "modification" for NSR is the same as defined for NSPS. Canons of construction are not necessary to discern this intent—the plain language is enough. *See United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 396 (1867) ("If the language be clear it is conclusive. There can be no construction where there is nothing to construe.").

This case is thus altogether different from the typical "identical term" case (on which the Petitioners and United States focus), given that Congress directed that the same meaning and usage of "modification" apply in NSR as in NSPS. In other words, Congress made a deliberate textual choice *not* "to spill more ink," neither redefining "modification" nor even repeating the same definition in NSR. That choice must be given effect. The Fourth Circuit recognized this when it held that the presumption of uniform usage was, in this particular case, "effectively irrebutable." Pet. App. at 17a.

B. Canons of Construction Support the Fourth Circuit's Decision

In determining Congress' intent, reviewing courts may employ, when necessary, traditional tools of statutory construction. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 n.9 (1984). Here, it is not necessary to resort to any canons of construction or "presumptions" to discern Congress' intent. Congress said "modification" shall mean that same under NSR as under NSPS—period. But if the Court were to employ such canons, it would find that they, too, support the Fourth's Circuit's decision.

1. *The Identical Term Maxim*

It is a general rule of statutory construction that "identical words used in different parts of the same act are intended to have the same meaning." *Comm'n of Internal Revenue Serv. v. Lundy*, 516 U.S. 235, 250 (1996). This Court regularly relies

on this maxim to give words uniform meaning across a statute. *See, e.g., id.* at 249-50 (giving the term "claim" a consistent meaning under 28 U.S.C. §§ 6511 and 6512); *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570 (1995) (construing "prospectus" as having identical meaning under § 10 and § 12 of the Securities Act of 1933); *Comm'n of Internal Revenue Serv. v. Keystone Consol. Indus. Inc.*, 508 U.S. 150, 159 (1993) (giving the term "sale or exchange" identical meaning under different provisions of the Internal Revenue Code).

Thus, even if this were simply a case where Congress had repeated the word "modification" in different parts of the statute, or repeated the operative words in the definition of "modification" elsewhere without further direction, the presumption would be in favor of identical meaning. But, this case involves much more than simply the "same word" used in two parts of the same statute.

Here, there is but a single formulation of the definition of "modification," making the case for identical meaning stronger. *Ratzlaf v. United States*, 510 U.S. 135, 143 (19 4) ("A term appearing in several places in a statutory text is generally read the same way each time it appears. We have even stronger cause to construe a *single* formulation . . . the same way each time it is called into play." (citations omitted)). Further, there is a definitional cross-reference between two sections of the same Act, which heightens the presumption of identical meaning. *See IBP, Inc. v. Alvarez*, 126 S. Ct. 514, 523-24 (2005) (recognizing heightened presumption of identical meaning where term "principal activities" explicitly referenced in separate section of the Act); *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (giving uniform meaning to term "child support" in two sections of same Act which cross-reference each other).

Nonetheless, Petitioners and the United States insist on treating this case as a simple "identical term" case. Pet. Br. at 44-45; U.S. Br. at 39-46. The Seventh Circuit makes the same mistake. *Cinergy Corp.*, slip op. at 7-9. They do so in

order to invoke the caveat that "the same word might well be used in one sense in one part of a statute and another sense in another." *E.g.*, *id.* at 8. The cases they rely on, however, are inapposite as none of them involve an express cross-reference to a single definitional formulation as is the case here. *See Wachovia Bank v. Schmidt*, 126 S. Ct. 941 (2006) (concluding that the undefined word "located," for purposes of national banks, was properly interpreted differently in venue statute than in subject-matter jurisdiction statute); *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581 (2004) (concluding that undefined word "age" could be interpreted differently under different provisions of ADEA); *Dist. of Columbia v. Carter*, 409 U.S. 362 (1973) (concluding that whether District of Columbia included as a "state or territory" depended upon particular statute at issue); *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84 (1934) (concluding that undefined word "obligations" could have different scope in different sections of the Revenue Act of 1926).[22] The present case stands apart from these typical "identical term" cases because Congress has directly spoken to the issue. As succinctly explained by one federal district court faced recently with this very issue: "[Although] [t]he same word can mean different things in the same statute[,] when Congress says the word is to be defined in the new part of the statute as it was defined in the existing part of the statute, that's not vague. . . . Congress meant what it said, and a reviewing court . . . should not substitute[] the agency's judgment for Congress's." *United States v. Alabama Power Co.*, No. 01-0152, Order on United States' Motion for Clarification, at 6-7 n.7 (N.D. Ala. Aug. 28, 2006).

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[22] This case is also not one where "the scope of the legislative power exercised in one [section] is broader than that exercised in another," so as to justify different meaning as in *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932).

Further, none of the Fourth Circuit's critics bother to explain how it is that Congress used "modification" in "one sense" in NSPS and "another sense" in NSR, as they claim did it. *See Cinergy Corp.*, slip op. at 8. To the contrary, Congress used "modification" in only one "sense"—*viz.* the "sense" in section 7411(a)(4), which it directed to be used for all subsequent new source programs. This is, therefore, not a case where the surrounding text or circumstances demand or even allow for a different meaning, as in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). In that case, the Court determined that the term "employees," defined generally under Title VII as "an individual employed by an employer," was broad enough to include both current and former employees depending upon the specific provision of Title VII using the term. As the Court explained, "Insofar as § 704(a) expressly protects employees from retaliation for filing a 'charge' under Title VII, and a charge under § 703(a) alleging unlawful discharge would necessarily be brought by a former employee, it is far more consistent to include former employees within the scope of 'employees' protected by § 704(a)." *Id.* at 345. There is no such context in the present case that would warrant or permit giving "modification" different meanings.

The only text of the statute identified by the United States as supporting different meanings is the opening "Congressional declaration of purpose" for the PSD provisions of NSR found at 42 U.S.C. § 7470. U.S. Br. at 46-47. But this general "goals and purposes" language is a far cry from the sort of explicit statutory context that would be necessary to overcome Congress' specific direction that "modification" mean the same in NSR as in NSPS. In fact, the United States does not even try to explain how interpreting "modification" the same for NSR as for NSPS would frustrate any goals or purposes, like restricting the term "employees" to only current employees would have done in *Robinson*. *See id.* at 47. The truth is that EPA does not believe it would—as evidenced by its recent proposed action to clearly bring the

emissions rate tests for NSR into conformity with NSPS. *See* 70 Fed. Reg. at 61,083/1 ("The proposed regulations would establish a uniform emissions test nationally under the NSPS and NSR programs. . . . We also do not believe the outcomes produced by the approach we have been taking [*i.e.*, in the NSR enforcement initiative] have significant environmental benefits compared with the approach we are proposing today."). Indeed, if NSR's air quality purposes can be achieved only by defining "modification" differently under the two programs, it would have been odd, to say the least, for Congress to have evinced such intent by explicitly directing that "modification" under NSR is "as defined in" and "the same as" NSPS.

2. *The Presumption of Ratification*

The presumption of ratification also supports the Fourth Circuit's decision. That canon of construction provides that Congress is presumptively aware of an existing regulatory definition of a term and is presumed to ratify that definition when adopting the same term in subsequent legislation. *See Bragdon v. Abbott*, 524 U.S. 624, 631 (1998).

The presumption of ratification is a fundamental canon of construction often used in conjunction with canons regarding identical meaning. *See, e.g., Keystone Consol. Indus.*, 508 U.S. at 158-59. Congress is presumed to be aware of existing statutory and regulatory law at the time it enacts new legislation. *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 133 n.4 (2002) (Congress presumed to be aware of HUD's existing interpretation of statutory term); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."). And, when "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law . . . ." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382 n.66 (1982); *Lorillard v. Pons*, 434 U.S.

575, 581-82 (1978). It thus follows that "Congress' repetition of a well-established term carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations." *Bragdon*, 524 U.S. at 631.

The case for ratification here is compelling. At the time Congress cross-referenced and incorporated into NSR the existing definition of "modification" in section 7411 of the statute, EPA had already established a definition of the term—not simply for the NSPS rules—but for section 7411 of the Clean Air Act in general. EPA's rules provided (and still provide):

> (a) Except as provided under paragraphs (e) and (f) of this section, any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies shall be considered a modification *within the meaning of section 111 of the Act* [42 U.S.C. § 7411]. . . .
>
> (b) Emission rate shall be expressed as kg/hr of any pollutant discharged into the atmosphere for which a standard is applicable. . . .

40 C.F.R. § 60.14 (emphasis added); 40 Fed. Reg. 58,416, 58,419/1 (Dec. 16, 1975). Congress is thus presumed not simply to know what EPA said "modification" means under the NSPS rules, but also what EPA had determined "modification" meant for section 7411 of the Clean Air Act—specifically, an activity that increases the unit's emission rate in terms of kilograms *per hour* (*i.e.*, its emission rate, unaffected by operating hours). Against this backdrop, Congress specifically cross-referenced and incorporated section 7411's definition of "modification" into NSR. This is above and beyond "repetition of a well-established term," which alone would have been sufficient for congressional ratification.

The statute and the legislative record confirm, not contradict, ratification in this case. As EPA concedes, one need

look no further than the statutory language to see that, when Congress enacted NSR in 1977, it was well aware of the existing new source regulatory programs, which defined "modification" consistently for NSR and NSPS. *See infra* at 24-25. Further, Congress added "modification" to the list of construction activity that could trigger NSR permitting through a "technical and conforming" amendment some three months after the principal 1977 amendments were enacted. Pub. L. No. 95-190, 91 Stat. 1393, 1399 (1977). As Congress explained in the legislative history of those technical and conforming amendments: "It's not the purpose of these amendments to re-open substantive issues in the Clean Air Act." 123 Cong. Rec. 36,252 (1977). Instead, by its action, Congress intended to "conform" the NSR definition of modification to its "usage in other parts of the Act." *Id.* at 36,331. The only "usage" at the time was that found in section 7411(a), which EPA had interpreted in 40 C.F.R. § 60.14 and elsewhere to mean an increase in emission rate unaffected by hours of operation.

Thus, rather than reinventing the wheel, Congress simply incorporated an existing term *and its usage* into NSR. As the Fourth Circuit held, this action "indicates congressional concern with the same sort of simplicity and consistency that the *Rowan* Court discerned from the legislative history examined there." Pet. App. at 15a. Congress' deliberate choice in this regard must be given effect. *See Sinclair Ref. Co. v. Atkinson*, 370 U.S. 195, 215 (1962) (Black, J.) ("In dealing with problems of interpretation and application of federal statutes, we have no power to change deliberate choices of legislative policy that Congress has made within its constitutional powers. Where congressional intent is discernible . . . we must give effect to that intent."), *overruled in part on other grounds by Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970); *see also* NORMAN J. SINGER, STATUTES & STATUTORY CONSTRUCTION § 53:01, at 322-23 (6th ed. 2000) ("Written law is the product

of a more specific structure involving deliberate choice. . . . Harmony and consistency are positive values in a legal system because they serve the interests of impartiality and minimize arbitrariness. Construing statutes by reference to others advances those values.").

III. CONGRESS INTENDED TO INCORPORATE INTO NSR THE NSPS CONCEPT OF "MODIFICATION"

Petitioners claim "there is [no] evidence" to support the conclusion that Congress intended to incorporate into the 1977 amendments the meaning of "modification" as that term had been implemented by EPA in the existing NSPS and NSR rules. Pet. Br. at 45 & n.34. They are mistaken.

A. The Existing Regulatory Regime Supports Incorporation

Petitioners' argument against incorporation relies heavily on the D.C. Circuit's opinion in *New York v. Environmental Protection Agency*, 413 F.3d 3 (D.C. Cir. 2005). The D.C. Circuit's conclusion in that case that the "proposition [in *Bragdon*] does industry little good here," however, is based on two fundamental misperceptions: 1) "the NSPS regulations adopted in 1975 and in force at the time of the 1977 CAA Amendments" contained "two different (and possibly inconsistent) definitions of modification" and 2) "the regulatory definitions in the NSPS and PSD programs already differed at the time of the 1977 amendments." *Id.* at 19. These two assumptions by the court are demonstrably wrong.

First, the NSPS rules in force in 1977 did *not* contain "possibly inconsistent[] definitions of modification." The basis for this erroneous perception was that, as of 1977, 40 C.F.R. § 60.2(h) contained a general definition that tracked the statutory definition, whereas 40 C.F.R. § 60.14 provided a more detailed and specific definition. The court found it particularly significant that § 60.14(b) specified that "emis-

sion rate" was to be "expressed as kg/hr of any pollutant discharged into the atmosphere," whereas § 60.2(h) contained no such provision. *Id.* at 19-20. According to the court, "neither the 1975 regulation nor its preamble explained" what the court termed "two separate glosses on" the term "modification." *Id.* at 12.

To the contrary, EPA gave such an explanation when it proposed § 60.14 in 1974, stating that the term "modification" as "defined in [section 7411(a)(4)] of the Act as well as in 40 C.F.R. 60.2(h)" included "several terms and phrases" that were "not fully understood *outside the Agency*." *See* 39 Fed. Reg. 36,946, 36,946/2 (Oct. 15, 1974) (emphasis added). The purpose of the revisions, EPA said, was to "resolve any confusion that may exist as to what constitutes a modification," *id.*—that is, simply to clarify these "terms and phrases" in § 60.2(h).

In particular, EPA explained at considerable length that the rationale behind paragraph (b) of § 60.14 was to "clarify the phrase in the definition of modification 'increases the amount of any air pollutant.'" *Id.* at 36,946/3. In this respect, EPA noted, the "units kg/hr *automatically* allow increases in operating hours as intended by one of the *existing* exemptions under 40 C.F.R. 60.2(h)." *Id.* at 36,947/1 (emphasis added). In other words, according to EPA, the existing exclusion for increased "hours of operation" meant, by definition, that only a project that increased a source's hourly emission rate could constitute an NSPS modification.

Thus, as explained by EPA, the provisions of § 60.2(h) and § 60.14 have from their inception existed in complete harmony with each other and do not in any way represent "two separate glosses" on "modification." EPA has recently affirmed once again that "[w]e [EPA] did not create a new definition of modification in codifying § 60.14." 70 Fed. Reg. at 61,096/1.[23]

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[23] In this *Federal Register* notice, EPA highlighted the regulatory history that the D.C. Circuit ignored and noted that it had "described the

Second, the regulatory definitions in the NSPS and PSD programs did *not* "already differ[] at the time of the 1977 amendments." 413 F.3d at 19.[24] The regulatory definition of "modification" in the PSD rules in force at the time of the 1977 amendments used an emission rate test just like NSPS and, just like the NSPS test, excluded increased hours of operation. 40 C.F.R. § 52.01(d). In fact, 40 C.F.R. § 52.01(d)—with its requirement for an emission rate increase unaffected by hours of operation—was, and continues to be, the only definition of "modification" found in the PSD rules.

EPA explained when it adopted § 52.01(d) that its goal was to create a "consistent" definition of "modification" for PSD and NSPS: "The general definition of modified source in Part 52 [PSD] is changed slightly to be more specific and to be consistent with the definition used in Part 60 [NSPS]. . . . It is the Administrator's intent to change the definition of modification under Part 52 to be consistent with the final definition of this term under Part 60." 39 Fed. Reg. 42,510, 42,513/1 (Dec. 5, 1974). That "final" definition, as discussed above, clarified that an increase in the "amount" of emissions is measured in terms of hourly emission rate. 40 Fed. Reg. 58,416 (Dec. 16, 1975).

Amici New York, *et al.*, attempt to downplay this regulatory history by suggesting that the NSPS definition promulgated in 1971 and in effect at the time § 52.01(d) was adopted "applied simply to 'increases [in] the amount of any air pollutant' with *no* reference to hourly emission rates." New York Br. at 11 n. 9. That is misleading. The 1971 NSPS

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relationship between the provisions contained in §§ 60.2 and 60.14 in a 1974 Federal Register notice" where it had "stated that the regulations concerning modifications in § 60.14 clarify the phrase 'increases the amount of any air pollutant' that appears in the definition of modification in § 60.2." 70 Fed. Reg. at 61,088 n.24.

[24] These PSD rules were part of EPA's "pre-statutory" PSD program. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 346-49 (D.C. Cir. 1979).

rules also explicitly excluded increases in hours of operation from activities that could "increase" the "amount of emissions." *See* 40 C.F.R. § 60.2(h). Further, in its 1974 PSD rulemaking, EPA specifically referenced its contemporaneous, on-going NSPS rulemaking in which EPA had explained that the existing hours of operation exclusion in § 60.2(h) is equivalent to measuring an emissions increase in terms of hourly rate. *See* 39 Fed. Reg. at 36,947.

Thus, EPA did *not* create "confusion" in 1974 when it promulgated a definition of "modification" under its pre-statutory PSD program that "closely tracked—but didn't precisely mirror—the NSPS regulatory definition" adopted in 1971. *Cf. New York*, 413 F.3d at 12. Rather, EPA clearly expressed its intention at the time of promulgation that the regulatory PSD definition be "consistent with the definition" of modification used in the NSPS rules. 39 Fed. Reg. at 42,513/1.

B. The Face of the Clean Air Act Supports Incorporation

Petitioners also argue that Congress' failure to incorporate the "modification" rule into the statute by express reference cuts against the presumption of incorporation. Pet. Br. at 46 n.35; *see also New York*, 413 F.3d at 19 ("Congress [in other sections] did incorporate regulatory provisions expressly by reference."). To the contrary, Congress did expressly validate the existing "modification" rule in 1977. Consider the unique backdrop to the 1977 amendments: Congress had before it EPA's pre-statutory PSD regulatory program and reviewed that existing program provision by provision, adopting some elements and changing others, either immediately or at some later date. One of the elements Congress did not change, and thus adopted, was the definition of "modification." The statute on its face demonstrates as much.[25]

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[25] As EPA has observed, "[w]ith respect to NSR, there is no need to speculate about whether Congress knew about EPA's pre-existing regula-

Specifically, Congress expressly provided that, until such time as an implementation plan was approved for any area, the "applicable regulations under this chapter prior to August 7, 1977 [*i.e.*, the 1974 rules using "emission rate" unaffected by hours of operation] shall remain in effect," except as those rules were deemed automatically amended by operation of section 7478(b). 42 U.S.C. § 7478(a). The definition of the term "commenced" (a version of which was already in the 1974 rules, *see* 40 C.F.R. § 52.21(b)(7) (1974)) was one of the items that Congress said must be immediately changed to the new statutory definition. *See* 42 U.S.C. § 7478(b). The existing definition of "modification" was *not*. *See id.* Further, the definition of the phrase "best available control technology" (again, a version of which was already in the 1974 rules, *see* 40 C.F.R. § 52.01(f) (1974)) was changed in the new statute, *see* 42 U.S.C. § 7479(3), but the change was delayed until subsequent approval of an implementation plan. *See id.* § 7478. Again, the existing regulatory definition of "modification" was *not*. Repeatedly, Congress showed nothing but approval of, and an intention to continue, the existing definition and usage of "modification," while meticulously changing and fine-tuning other aspects of the program.

"[W]here Congress has re-enacted the statute without pertinent change," "*congressional failure to revise or repeal the agency's interpretation* is persuasive evidence that the interpretation is the one intended by Congress." *Nat'l Labor Relations Bd. v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974) (emphasis added). Such is the case here. In 1977, Congress effectively *did* "reenact" a portion of the Clean Air Act "without pertinent change" when it defined "modification" for NSR purposes to mean "modification" as defined in section 7411(a). When it did so, Congress had squarely

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tions because, on the face of the statute, CAA section 168 demonstrates such awareness." EPA's Petition for Rehearing or Rehearing en Banc, *New York v. Envtl. Prot. Agency*, No. 03-1380, at 13 (May 1, 2006).

before it EPA's contemporaneous interpretation of "modification" as a change that increases an existing unit's emission rate unaffected by hours of operation. Congress chose not to "revise or repeal" this aspect of the rules, and its choice must be given effect. *Cf. Lorillard*, 434 U.S. at 481. (The "presumption" that Congress "had knowledge of the interpretation given to the incorporated law" is "particularly appropriate [where] Congress exhibited both a detailed knowledge of the [existing] provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation.").

C. Contemporaneous EPA Action Supports Incorporation

EPA itself shares this view. For example, in the preamble to the first set of NSR rules promulgated by EPA after the 1977 amendments, EPA explained that its proposal "not to treat a voluntary fuel or raw material [switch] as a modification" had been opposed by environmental groups who asserted that "Congress intended all such switches to be treated as modifications." *See* 43 Fed. Reg. 26,388, 26,396/3 (June 19, 1978). EPA "disagree[d] with this contention" because "[section 7479(2)(C)] of the [Clean Air Act] by its reference to [section 7411(a)] in effect adopts the definition of 'modification' under [section 7411(a)] for the purposes of PSD." *Id.* "In adding [section 7479(2)(C)] to the Act, Congress indicated that it intended to conform the meaning of 'modification' to 'usage in other parts of the Act.'" *Id.* (quoting 123 Cong. Rec. H11957 (Nov. 1, 1977)). EPA found this significant because, as of the 1977 amendments, "*regulations* promulgated under section 7411 had defined 'modification' to exclude voluntary fuel switches" where the source had been "designed to accommodate that alternative use." *Id.* (quoting 40 C.F.R. § 60.14(e)(4)) (emphasis added). "Consequently," EPA said, "it would appear that Congress did not intend voluntary fuel switches to be treated as modifications for PSD purposes." *Id.* at 26,396-97.

In other words, within a year after enactment of the 1977 amendments, EPA determined that Congress intended "modification" under NSR to mean the same sort of activity that constituted "modification" under the NSPS program. In the case of voluntary fuel switches, EPA reasoned, because such activity was excluded from the NSPS regulatory definition of "modification," Congress must have intended that it be excluded from the definition of "modification" under the NSR program. By the same token, in 1977, the NSPS rules provided (and still today provide) that a change to an existing source would not constitute a "modification" unless that change increased the source's emission rate measured on an hourly basis. Accordingly, under EPA's logic, Congress must have intended that only such changes could trigger NSR.

EPA has repeatedly affirmed this view. For instance, in 1984, EPA said that the phrase "usage in other parts of the Act" in the legislative history "most probably refers, not only to section [7411(a)(4)], but also to the EPA regulations implementing [section 7411] that were in effect at the time." 49 Fed. Reg. 43,211, 43,213/3 (Oct. 26, 1984). More recently, EPA reiterated that, "by defining 'construction' in Part C to conform to usage in other parts of the Act," Congress in 1977 was referring to EPA's "preexisting rules interpreting the term 'modification' in the NSPS context." 68 Fed. Reg. at 61,269/2. This Court should give great weight to EPA's *contemporaneous* and *consistent* interpretation of the Clean Air Act.

IV. THE STATUTE DOES NOT PROHIBIT AN HOURLY RATE TEST FOR NSR AND NSPS

Finally, Petitioners and their amici argue that the plain statutory text "requires that EPA 'apply NSR to changes that increase actual emissions . . . .'" Pet. Br. at 49 (quoting *New York*, 413 F.3d at 40). According to Petitioners, the "maximum hourly rate test" (that has been part of the NSPS definition of modification for over thirty years) "violates that command." *Id.* On that basis, Petitioners argue that the NSR

rules would "violate the plain text" of the statute if they were read consistent with the NSPS rules to apply only to activity that caused a facility's hourly emissions rate to increase. *Id.* Petitioners are wrong.[26]

As an initial matter, an hourly rate test *is* an actual test, as EPA has unequivocally and consistently stated. *See* 70 Fed. Reg. at 61,091 ("[A] test based on maximum achievable hourly emissions is a test based on actual emissions."); 39 Fed. Reg. at 36,946 ("[NSPS test] clarifies that for an existing facility to undergo a modification there must be an increase in actual emissions. . . . [T]he proposed definition of modification is limited to increases in actual emissions in keeping with the intent of section [7411] of controlling facilities only when they constitute a new source of emission."). This is why the United States does not support Petitioners' argument on this issue. U.S. Br. at 47-48 n.18.

But even if this Court concludes that the United States is wrong and an hourly emissions test is not an "actual" test, it does not follow that increased hours of operation must trigger NSR permitting. Petitioners' argument that the Clean Air Act's plain text requires a test for "modification" under which an "increase" must be read as an increase in operating hours within permit limits (or what Petitioners refer to as their "actual" annual emissions test), *see* Pet. Br. at 40, is incorrect, and to the extent *New York* supports such a conclusion, it is wrong. The word "emitted" in section 7411(a) simply does not carry the water *New York* suggests it does. *See* 413 F.3d at

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[26] While the States of New York and Pennsylvania likewise argue that the plain meaning of the Clean Air Act mandates what they call an "actual" annual emissions test, *see* New York Br. at 8-9, 22-23, their own state NNSR rules are based on "potential" and "allowable" emissions tests. *See* N.Y. COMP. CODES R. & REGS. tit. 6, §§ 231-2.3(a), 231-2.1(b)(40); 25 PA. CODE §§ 127.211(a), 127.211(c)(1). Because the NNSR program shares an identical statutory definition of "modification" as PSD and NSPS, *see* 42 U.S.C. § 7501(4), their argument calls into question the validity of their own rules.

40.[27] On its face, the word "emitted" in section 7411(a)(4) serves merely to modify the word "pollutant," in order to distinguish between those pollutants that the existing source was already emitting prior to a change (and which would be "increased" by the change) and pollutants that the source had never "previously emitted" (but which it would emit following the change). Thus, neither the word "emitted," nor the entire phrase "amount of any air pollutant emitted," provides the clear statutory directive that Petitioners claim.

Petitioners are also wrong to suggest that Congress' use of the terms "emit," "potential to emit," and "emissions limitation" in other parts of the statute establishes Congress' intent to equate the unqualified words "emit," "emitted," or "emissions" to "actual" emissions. Pet. Br. at 49 (citing *New York*, 413 F.3d at 39). If Congress had intended the term "emit," "emitted," or "emission" to unambiguously refer to *actual* emissions only, it would not have needed to explicitly qualify references to emissions with the word "actual" elsewhere in the statute. But Congress did so—in 1970, in 1977, and again in 1990. For instance, in 1970, Congress added section 7521(b)(1)(B), which specifically required rules under section 7521(a) to include standards requiring "a reduction of a least 90 percentum from the average of *emissions* of oxides of nitrogen *actually* measured from light duty vehicles . . . ." (Emphasis added.) Similarly, in 1977, Congress added section 7502(c)(3) (originally section 7502(b)(4)), which specified that a state's emissions inventory is to be based on "*actual* emissions." (Emphasis added.) In 1990, Congress amended the definition of "modification" in the hazardous air pollution section in the statute, changing it from a cross-reference to the § 7411 definition of

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[27] The United States has convincingly explained the D.C. Circuit's error in this regard. *See* U.S. Br. at 47-48 n.18; EPA's Pet. for Rehearing or Rehearing En Banc, *New York v. Envtl. Prot. Agency*, No. 02-1387 (Aug. 8, 2005).

"modification" to a new definition that explicitly references "actual emissions." *See* 42 U.S.C. § 7412(a)(5) (1990). If the section 7411 definition already unambiguously referred to "actual" emissions, there would have been no reason for Congress to qualify the word "emission" with the word "actual" as it did in these other provisions.

Finally and decisively, the very D.C. Circuit decision that Petitioners and their amici rely on *upheld* an NSPS provision using the maximum hourly emission test they find so objectionable. Specifically, the court upheld a revision adopted by EPA in 1992 defining "modification" as an increase in the "maximum hourly emissions of any pollutant . . . above the maximum hourly emissions achievable at that unit during the 5 years prior to the change." *New York*, 413 F.3d at 27 ("Environmental petitioners' . . . contention that the 1992 rule violates the statutory term 'any' by excluding some emissions-increases changes from NSPS fails . . . ."); *see also* 40 C.F.R. § 60.14(h); 57 Fed. Reg. 32,339 (July 21, 1992). In fact, for over thirty years "modification" under NSPS has meant only activity that increases the hourly rate of emissions, and that test has never been questioned by any court. *See* 40 Fed. Reg. at 58,416-19; 39 Fed. Reg. at 36,946-47.[28] If such an hourly test is permissible for NSPS, it must be permissible for NSR, as the two programs share the exact same statutory definition of "modification."

CONCLUSION

For the foregoing reasons, the judgment of the Fourth Circuit should be affirmed.

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[28] Many aspects of the 1975 NSPS rules were challenged in *ASARCO Inc. v. Envtl. Prot. Agency*, 578 F.2d 319 (D.C. Cir. 1978). No one challenged, and the court did not question, the hourly emissions rate test in those rules.

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IN THE

Supreme Court of the United States

ENVIRONMENTAL DEFENSE, *et al.*,

Petitioners,

v.

DUKE ENERGY CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, AND THE ELECTRIC RELIABILITY COORDINATING COUNCIL AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE[1]

The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (commonly referred to as "the Boilermakers Union") is a

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[1] Pursuant to Rule 37.6 of the Rules of this Court, counsel hereby certifies that the brief submitted on behalf of *amici curiae* Boilermakers Union and ERCC was not authored in whole or in part by counsel for a party, and no person or entity other than the *amici* and their staffs have made a monetary contribution to the preparation of this brief. The parties have granted consent for the filing of *amicus curiae* briefs.

diverse union representing over 70,000 workers throughout the United States and Canada in construction, repair, maintenance, manufacturing, professional emergency medical services, and related industries.

The Boilermakers Union is the principal union responsible for the installation, maintenance, and repair of industrial boilers, as well as the installation of the pollution control equipment utilized to achieve the emissions reductions that are the goals of the Clean Air Act, 42 U.S.C. §§ 7401 et seq. ("the Act"). As a result, the Boilermakers Union has a dual concern: first and foremost, to have safe and productive workplaces for boiler operations; and second, to ensure the sensible implementation of clean air standards that foster the market for Boilermaker services while protecting health, safety and the environment.

Boilermakers have been active participants in the policy making process regarding emissions control, power-plant maintenance, and related topics. Representatives from Boilermaker locals have testified at U.S. Environmental Protection Agency ("EPA") field hearings on the new source review ("NSR") enforcement program, and the Union's Government Affairs Office has submitted Congressional testimony and authored letters on clean-air topics including NSR.

The Electric Reliability Coordinating Council ("ERCC") is coalition of electric power-generating companies established in 2001 and dedicated to commonsense strategies for implementation and enforcement of the Act. ERCC has been particularly active in the public policy discourse regarding the NSR program. As a general proposition, ERCC has taken the position that the U.S. Department of Justice and EPA were not correct when they brought various NSR enforcement cases in 1999, specifically misstating the basis upon which construction activities may

trigger an NSR evaluation at existing facilities. In addition, ERCC has also supported clarification of the NSR program through the rulemaking and legislative processes, and has sought to explain the policy issues relevant to such clarification to the interested public.

Collectively, the members of ERCC generate electricity for millions of consumers in most regions of the United States. ERCC members have an obligation to provide reliable electrical service to these consumers and believe that the NSR program should not and need not force choice between reliable and efficient power production and environmental protection.

SUMMARY OF THE ARGUMENT

It is the intention of this brief to place the question of the alleged need for NSR evaluation for construction and maintenance activities at existing facilities in a broader public policy context.

Whether an agency's reading of a regulation is inconsistent with a statutory mandate or would frustrate the congressional policy underlying a statute are properly within the province of a court addressing the agency's enforcement of the regulation. Therefore, administrative (including enforcement) decisions that are inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute should not be upheld. *See, e.g., NLRB v. Brown,* 380 U.S. 278, 291-92 (1965); *see also, FEC v. Democratic Senatorial Campaign Comm.,* 454 U.S. 27, 31-32 (1981) (noting that "administrative constructions of the statute, whether reached by adjudication or by rulemaking" must be rejected to the extent that such actions "frustrate the policy that Congress sought to implement" (citations omitted)); *FMC v. Seatrain Lines, Inc.,* 411 U.S. 726, 745-46 (1973); *Volkswagenwerk v. FMC,* 390 U.S. 261, 272 (1968).

While the present *amici* do not contend that policy objectives should substitute for sound legal reasoning in the enforcement arena, we do believe that the policy arguments create an important lens through which the purposes and objectives of proper enforcement initiatives can be usefully viewed. Further, the policy context propagated by *amici* allied with petitioners tends to misapprehend the alleged environmental consequences, understate potential environmental benefits, and ignore entirely other proven benefits to cautious application of NSR to construction and maintenance activities at existing facilities, such approach supported by EPA's clear and contemporaneous explanation of the meaning of the 1980 regulation at issue here.

The first section of this brief will place the NSR program and the legal standards arising there-under in the proper environmental policy context. The Boilermakers Union and ERCC will demonstrate that emissions are currently declining and will continue to decline; that NSR is not the basis of these declines; that an overbroad application of NSR will hamper the highly successful market approaches developed under the Act; and that such application can actually delay or prevent technological improvements needed for additional clean-air progress.

The second section of this brief will review distributional impacts that can arise from improper imposition of NSR on construction and maintenance activities at existing facilities. By restricting energy supply and undermining reliability, the petitioners' view of the law could wreak havoc on reliable supplies of electricity and industrial manufacturing and could result in harm to those in society least able to afford it: those living in poverty; the elderly and those on fixed incomes; majority-minority communities; and those living in rural areas seeking to diversify their economic base.

The last section of the brief will describe the unacceptable choice created by petitioners' interpretation in the area of occupational safety. No interpretation of the Act should place environmental and safety obligations at odds with one another, particularly when a commonsense, long-held interpretation avoids this Hobson's Choice altogether.

ARGUMENT

I. A "Modification" Test Triggered by Activity that Increases a Facility's Hourly Emissions Rate Is Consistent with Environmental Protection

As a primary matter, and contrary to the views expressed by *amici* allied with petitioners, criteria air emissions for stationary sources have been on a continual decline over the past two decades. As the EPA Air Trends report states in its executive summary: "Since 1970, aggregate emissions of the six principal pollutants have been cut 48 percent. During that same time, U.S. gross domestic product increased 164 percent, energy consumption increased 42 percent, and vehicle miles traveled increased 155 percent." Air Quality and Strategies Division, EPA, *Latest Findings on National Air Quality* 1 (2003) (No. EPA-454/K-03-001).

Under Phase I of the Title IV program alone, utilities reduced SO_2 emissions by eight million tons – nearly 50% below their 1990 emissions level and 30% below the Phase I cap. [1] Clean Air Markets Division, EPA, *1999 Compliance Report: Acid Rain Program* 2 and 5 (2000) (No. EPA-430-R-00-007). The environmental benefits of these reductions were catalyzed by the banking and trading mechanisms provided by the flexible cap-and-trade program – 75% of the total allowances created were banked and 30 of the 51 firms

used intra-firm averaging.[2] The success of cap-and-trade programs is not surprising – the programs integrate environmental decision-making into the financial reality that fuels companies.[3]

The NSR program hardly explains this positive and continuing trend in emissions reductions. Contrary to the statements of some, the NSR program is not the centerpiece of the Clean Air Act. Rather, it is a narrowly tailored program designed principally to address new sources (as the name implies), which includes modifications of existing sources, a relatively rare occurrence.

The lion's share of emissions reductions are related to implementation of the national ambient air quality standards as reflected in state implementation plans and, ultimately, in the permit conditions applicable at individual plants. The NSR program does not set or alter these standards.

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[2] Byron Swift, *Command Without Control: Why Cap-and-Trade Should Replace Rate Standards for Regional Pollutants*, 31 Envt'l L. Rep. (Envt'l Law Inst.) 10,330, 10,331 (2001) (citing Environmental Law Institute, Analysis of EPA 1995-1999 Compliance Reports). *See also,* Curtis Carlson, et al., *Sulfur Dioxide Control By Electric Utilities: What are the Gains from Trade?*, 108 J. of Pol. Econ. No. 6 1292, 1320 (2000) (concluding that "[t]he flexibility of the trading program has encouraged utilities to capitalize on advantageous trends, such as changing fuel prices and technological innovation that might have been delayed or discourage by traditional regulatory approaches.").

[3] *See also,* Byron Swift, *Allowance Trading and SO_2 Hot Spots – Good News from the Acid Rain Program,* 31 Env't Rep. (BNA) No. 19, at 957 (May 12, 2000) (concluding that "[t]hese data confirm a general prediction about cap and trade programs, that they will tend to create incentives for the dirtiest plants to clean up the most, as the per-ton cost of emissions reductions may be expected to be the least. . . . These data show that, if anything, trading may be expected to cool hot spots and not create them.").

The environmental and energy benefits of adhering to the historical meaning of the regulations providing that the NSR program is triggered only by "modification" activity (i.e., activity that increases a facility's hourly emission rate) that is "major" can be summarized as follows. Investments in pollution prevention and in maintenance are facilitated when the powerful disincentives created by inflexible NSR enforcement strategies are removed. As experts from Harvard University's Kennedy School of Government and from the think-tank Resources for the Future have written, "Research has demonstrated that the New Source Review process drives up costs tremendously (not just for the electricity companies, but for their customers and shareholders, that is, for all of us) and has resulted in worse environmental quality than would have occurred if firms had not faced this disincentive to invest in new, cleaner technologies." Howard Gruenspecht & Robert Stavins, Op-Editorial, *A Level Playing Field on Pollution at Power Plants*, Boston Globe, Jan. 26, 2002, at A15.

Considered authorities from the Massachusetts Institute of Technology and National Economic Research Associates, Inc. concluded that "a properly designed [emissions trading] program provides a framework to meet emissions reduction goals at the lowest possible cost . . . by giving emissions sources the flexibility to find and apply the lowest-cost methods for reducing pollution. . . . In practice, well-designed emissions trading programs also have achieved environmental goals more quickly and with greater confidence than more costly command-and-control alternatives." A. Denny Ellerman, Paul L. Joskow & David Harrison, Jr., *Emissions Trading in the U.S.: Experience, Lessons, and Considerations for Greenhouse Gases*, at iii (Pew Center on Global Climate Change, May 2003). The NSR enforcement initiative, by interposing such "costly command-and-control" requirements even as more effective

market-sensitive approaches are being pursued, frustrates effective implementation of the Act.

II. The Historical NSR Test Results in Significant Distributional Benefits Over the EPA Enforcement Test

Simply put, the litigation-focused approach reflected in the 1999 EPA NSR enforcement initiative can create unacceptable burdens on those in society least able to afford it. First, if the environmentalist claims are taken at face value, it is clear that an effort is being made to undermine the future use of coal-fired power as an energy source in the United States. While petitioners have focused their efforts in the instant case on existing coal-fired facilities, allied organizations have displayed a disturbing reluctance to support the siting or development of new coal-fired power generation capacity, regardless of the technology utilized.

The problem with opposition to both old and new coal-fired capacity is that coal represents over half of U.S. electric generating capacity, and "more than 80 percent of America's known recoverable fossil fuel reserves." Illinois Clean Coal Institute, *Facts About Coal* (2003) ("Coal presently accounts for 55 percent of the electricity generated in the United States. Approximate totals for other fuels: nuclear, 21 percent; hydroelectric, 10 percent; natural gas, 9 percent; petroleum, 4 percent."), available at http://www.icci.org/news/fact.html.

Any interpretation of the Act designed to marginalize or eliminate such a major portion of electric-generating capacity does so with great economic impact to consumers on fixed incomes or those living at or near the poverty level. Viewed in the context of recent discussions on caps on carbon emissions, the Congressional Budget Office recently reflected upon these significant distributional impacts:

"The price increases resulting from a carbon cap would be regressive--that is, they would place a relatively greater burden on lower-income households than on higher-income ones. Higher-income households would face larger costs in dollar amounts, but those costs would make up a smaller share of their average annual income. For example, one study estimated that the price increases resulting from a 15 percent cut in carbon emissions would cost the average household in the lowest one-fifth of the income distribution about $560 a year, or 3.3 percent of its average income. Households in the top one-fifth of the income distribution would pay an additional $1,800 a year, or 1.7 percent of their average income." Congressional Budget Office, *Shifting the Cost Burden of a Carbon Cap-and-Trade Program*, at ix (July 2003).

Groups on the frontline of addressing the distributional impacts of energy costs have likewise commented on the relationship between inflexible Clean Air policy and unacceptable results for those living in poverty. Catholic Charities of Cleveland testified that, "conversion to natural gas from coal would have a devastating effect on the people of Ohio and our country, particularly the poor and the elderly." *Clean Power Act: Hearings on S. 556 Before S. Comm. on Env't & Pub. Works,* 107th Cong. 757 (2002) (statement of J. Thomas Mullen, President & CEO, Catholic Charities Health and Human Services). The group attempted to quantify the impact of such fuel conversion as follows:

"The overall impact on the economy in Northeast Ohio would be overwhelming, and the needs that we address at Catholic Charities in Ohio with the elderly and poor would be well beyond our capacity and that of our current partners in government and the private sector. In a recent study on Public Opinion on Poverty, it was reported that one-quarter of Americans report having problems paying for several basic necessities. In this study, currently 23% have difficulty

in paying their utilities - that is, one out of four Americans." *Id.*

The profound distributional impacts of an inflexible approach to NSR enforcement led the National Conference of Black Mayors, the National Indian Business Association, and three other African American groups to find that: "At the same time, however, local facilities that provide our communities with jobs and economic opportunity must be able to perform routine maintenance and add process improvements to keep their operations safe, reliable, productive and, importantly, to improve energy efficiency, decrease emissions and maintain competitive flexibility. In our view, the current NSR program, as applied, has a disparate impact on urban and minority communities by placing at risk economic and energy security and improvements in air quality." Steve Cook, *Black Mayors, Native American Group Call for Quick Action on New Source Review*, Daily Env't Rep. (BNA) No. 93, at A-2 (May 14, 2002).

Aside from adverse distributional impacts that manifest along socio-economic grounds, the EPA's enforcement approach to NSR results in adverse impacts along geographical grounds as well. Rural areas, in particular, are hard hit. The rural economy is increasingly attempting to diversify its base. Relying exclusively on agriculture is risky. In a real sense, the need to diversify the rural economic base is dependent on the availability of reliable and affordable electricity, a proposition made more difficult by an inflexible approach to NSR. Experts at the Center for Economic Development and Research at the University of North Texas wrote:

"Against this backdrop, [EPA's] new interpretation of the [NSR] rules will make a bad economic situation worse for rural America. This is particularly the case for

communities that are attempting to diversify away from commodities by attracting manufacturing enterprises, business services, tourism, and other growth industries. To the extent application of the NSR program to utilities and manufacturers serving or located in non-metropolitan areas inflates the cost of electric power or creates uncertainty about the reliability of delivery, businesses and households will be even less inclined to locate or expand in these communities." Bernard L. Weinstein, Ph.D. & Terry L. Clower, Ph.D., *The EPA's Reinterpretation of New Source Review Rules: Implications for Economic Development in Rural America* 1 (May 2002), available at http://www.unt.edu/cedr/NSR.pdf

Unfortunately all the above-cited groups may have severely *underestimated* the impact of EPA's enforcement interpretation of NSR. A basic unspoken premise of the enforcement initiative is that EPA had *never* previously interpreted NSR in the manner it seeks to in this and other enforcement cases. As respondents and other *amici* have cautioned, requiring NSR review and permitting for the common repair and replacement of utility unit and manufacturing components would mean minimum waiting periods of 6 to 22 months *every* time a plant is forced to shut down to repair or replace a component. *See, e.g., Amicus Curiae* Brief of American Public Power Association in the instant case. Moreover, electric utilities are particularly susceptible to periods of coincident peak demand, since demand is driven in large part by weather, and utilities are forced to operate more of their generating units during such peak demand periods. That means that the older and less reliable units are required to run, and if a unit breaks down, then its load must be picked up by another unit. Meanwhile, neighboring utilities are doing exactly the same thing.

But EPA's litigation position would make contemporaneous repairs during and following peak periods

a thing of the past. It would disrupt all repair planning and would eventually lead to idling large amounts of generation to wait for state and federal agency approval to undertake the types of repairs that have occurred forthwith for decades. The nation has never experienced the effects of EPA's enforcement interpretation, because EPA had never sought to reinterpret the 1980 rules in this manner. If EPA and petitioners have their way, the best outcome will be prolonged periods of idled manufacturing and electric generation capacity and the associated inability to meet citizen demand for basic necessities – electricity in the dark, cooling in the heat, heat in the winter, and the like. According to labor organizations, the impact on employment in industries attempting to compete in an international marketplace could create risk to tens of millions of jobs.[4] This does not and cannot reflect the balance between air quality and economic vitality that Congress so carefully considered when creating the NSR program.

III. The Historical NSR Test Avoids Unacceptable Compromises Between Environmental and Occupational Safety Goals

A test under which NSR is triggered only for "modifications" that are "major" allows for common repair and replacement activities by avoiding the simplistic notion that a mere increase in hours of operation can trigger the program. The Boilermakers Union, along with many labor

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[4] Letter from Bill Cunningham, President, Unions for Jobs and the Environment, to Congressmen Joe Barton and John Dingell (Oct. 5, 2005) ("Further, by reducing the useful economic life of boilers or by inaccurately setting baselines, the existing NSR confusion undermines the competitiveness of American job sites. The result is that some of the almost 20 million manufacturing jobs at stake in heavy industry are placed at risk."), available at http://www.eenews.net/EEDaily/Backissues/images/100605dr1.pdf.

organizations,[5] has pointed out that these efforts can pay tangible dividends in the form of enhanced workplace safety. Boilers at industrial facilities or electric utilities are subject to constant stress and pressure.

For their part, Boilermakers have historically supported tough air pollution standards -- while at the same time casting a wary eye for those policies that may impact on safety or competitiveness in these workplaces. The Boilermaker position was explained in Senate testimony:

"Boilermakers could not support the EPA's 1999 recent interpretation of its authority under the [NSR] program. NSR, correctly interpreted, as we believe the Administration's clarification does, forces new sources or those undergoing major modifications, to install new technology...We support NSR in that context. But, when NSR is applied to the routine maintenance policies and schedules of existing facilities, very different results occur. In those cases, facilities are discouraged from undertaking routine actions for fear of huge penalties or long delays or both. By applying NSR in that way, we are pretty sure that Boilermakers won't have the opportunity to work on maintenance projects that we know are extremely important

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[5] Other unions agree with the need for clarification of the NSR program. One coalition of some ten manufacturing unions, Unions for Jobs and the Environment, has written that, "A number of industry and labor groups have complained that changes in EPA rules in 1997 made the definition of routine maintenance unclear. Because of those changes, what was previously regarded as routine maintenance now requires an investment in pollution control equipment as if the facility were newly built. Uncertainty about the rules can cause a delay of maintenance, often affecting health and safety, or result in the closure of the plant and the loss of jobs." *Modification of New Source Review*, Unions for Jobs and the Environment Newsletter, Apr.-June 2002, at 2, available at http://ujae.org/NewsRes/ujae%20newsletter%20apr%20jun%202002.pdf.

to energy efficiency." *New Source Review Policy, Regulations and Enforcement Activities: Joint Hearing Before the S. Comm. on Env't & Pub. Works and the S. Comm. on the Judiciary,* 107th Cong. 25-26 (statement of Ande Abbott, Director, Legislative Department, International Brotherhood of Boilermakers) (also citing the experience of the California and New York electricity crises, the Boilermakers Union testified that NSR enforcement should not be allowed "to play with the reliability of the power grid.") [hereinafter, "Boilermakers Testimony"].

Upon passage of the Occupational Safety and Health Act of 1970 ("OSH Act"), Congress declared its "purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 651(b); *see Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 102 (1992) ("Our review of [OSH Act] persuades us that Congress sought to promote occupational safety and health while at the same time avoiding...possibly counterproductive regulation."). *Amicus* Boilermakers Union, in testimony before Congress, explained that, "maintenance is necessary to maintain worker safety. Electric generating facilities harness tremendous forces: superheater tubes exposed to flue gases over 2000 degrees; boilers under deteriorating conditions; and parts located in or around boilers subjected to both extreme heat and pressure. Any EPA interpretation which creates incentives to delay maintenance is simply unacceptable to our workers." Boilermakers Testimony at 26. The Boilermakers Union later testified that, "the threat of litigation too often acts as a deterrent to capital investments that create work and maintain safe facilities for our members." *Clear Skies Act of 2005: Hearing on S. 131*

Before the S. Comm. on Env't & Pub. Works, 109th Cong. (statement of Abraham Breehey, Legislative Representative, Government Affairs Department, International Brotherhood of Boilermakers) (Feb. 1, 2005), available at http://epw.senate.gov/hearing_statements.cfm?id=231305.

CONCLUSION

Proponents of the EPA interpretation, with its broad application of NSR to construction and maintenance activities at existing facilities, have often portrayed the issue as a Manichean dispute between environmental right and wrong. In reality, and unsurprisingly, the issues are more complex. In fact, when viewed in proper context, the historical test governing what is "construction" that triggers NSR (as opposed to EPA's interpretation in the instant enforcement case) is more consistent with effective Clean Air Act emissions control, and better preserves electric reliability, efficiency, affordability, and occupational safety.

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Petitioners,

v.

DUKE ENERGY CORPORATION, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF *AMICI CURIAE* OF LAW PROFESSORS IN SUPPORT OF RESPONDENT DUKE ENERGY CORPORATION

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INTEREST OF AMICI CURIAE[1]

Amici are law professors with an interest in constitutional, administrative, environmental, and general regulatory law issues. Each is concerned with the status and development of the law in these areas, and believes that the questions raised by this case are of the highest importance. Each has participated as Amici in courts of appeals that have addressed the new source review program, including the proceedings below and those in *United States v. Cinergy Corp.*, No. 06-1224 (7th Cir. 2006). Their individual qualifications are as follows:

Jonathan Adler is Professor of Law and Co-Director, Center for Business Law & Regulation, Case Western Reserve University. He teaches courses in administrative, constitutional, and environmental law, and his writing focuses primarily on environmental and regulatory policy issues.

John S. Baker, Jr., is the Dale E. Bennett Professor of Law, Louisiana State University Paul M. Herbert Law Center. He teaches constitutional law and federal courts, and has litigated a number of federal court cases.

Dr. John C. Eastman is Professor of Law, Chapman University School of Law, where he teaches constitutional law. He is also Director of The Claremont Institute Center

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[1] The parties have consented to the filing of this brief. Environmental Defense and Duke Energy Corp. have filed herein letters of consent to the filing of amicus briefs in support of either party, and the United States' letter of consent is filed herein in conjunction with the brief. Pursuant to Rule 37.6, counsel hereby states that this brief was not authored in whole or in part by counsel for a party and that no monetary contribution to the preparation or submission of this brief was made by any person other than Amici and their counsel.

for Constitutional Jurisprudence, in which capacity he has litigated a number of cases addressing the structure of the U.S. Constitution, including *United States v. Morrison*, 529 U.S. 598 (2000), *Solid Waste Agency of Northern Cook Co. v. Corps of Engineers*, 531 U.S. 159 (2001), and *Rancho Viejo LLC v. Norton*, 323 F. 3d 1062 (D.C. Cir. 2003).

James L. Huffman is the Erskine Wood Sr. Professor of Law, Lewis & Clark Law School. He is former Dean, Lewis & Clark Law School, and is former Director of the Natural Resources Law Institute at Lewis & Clark Law School.

Donald J. Kochan is Assistant Professor of Law, Chapman University School of Law, where he teaches courses in natural resources law, environmental law, federal courts, property, and law and economics.

Roger Meiners is the John and Judy Goolsby Distinguished Professor of Economics and Law, University of Texas at Arlington. He has written and edited several books on environmental law and policy.

The views expressed herein are those of the individual Amici, and do not necessarily represent the views of any group or organization with which any of them may be affiliated.

SUMMARY OF ARGUMENT

The court of appeals correctly interpreted the Environmental Protection Agency's ("EPA") prevention of significant deterioration regulations' definition of "modification" consistent with the new source performance standards regulations' use of that term. Courts entertaining civil

judicial enforcement actions by an administrative agency have an absolute duty to determine what the law is, and not merely blindly accept the agency's interpretation of the law advanced in that enforcement action. Where the law being applied is a regulation promulgated by an agency exercising delegated authority, the court must follow the reasonable interpretation of that regulation which is consistent with the governing statute under which such delegation was made. This duty is not affected by the existence of provisions in the governing statute limiting the jurisdiction of a court entertaining the enforcement action to review prior agency action, which resulted in the original promulgation of the underlying regulation.

The court of appeals followed these established principles. It determined that the EPA's litigation position in this case conflicted with the Clean Air Act. The court of appeals also adopted the district court's analysis demonstrating that the prevention of significant deterioration regulations governing this action could be interpreted consistently with the statute and the regulatory text. Indeed, the EPA itself interpreted the regulations in this way at the time they were promulgated. Upon these findings, the court of appeals correctly exercised its independent judgment and found that the prevention of significant deterioration regulations had a meaning consistent with the Clean Air Act.

Petitioners' attempts to mischaracterize the court of appeals' analysis of the Clean Air Act's statutory provisions as judicial review prohibited by Clean Air Act § 307 are unavailing. Petitioners argue that the court of appeals engaged in unauthorized judicial review because the prevention of significant deterioration regulations cannot

be interpreted consistently with the new source performance standards regulations. This argument misses the point. If the prevention of significant deterioration regulations cannot be interpreted consistently with the new source performance standards regulations, the court of appeals would have erred by incorrectly interpreting the regulation, not by exceeding Clean Air Act § 307's limitations on its jurisdiction. The court of appeals did not so err, however.

More fundamentally, by arguing that the court of appeals mistakenly considered the Clean Air Act's plain language when adjudicating the merits of the EPA's litigation interpretation of its regulations, Petitioners ask the Court to prevent lower courts throughout the country that are currently considering alleged violations of the prevention of significant deterioration or new source review program from giving these regulations meaning consistent with the Clean Air Act's plain text. The Court should refuse. Instead, it should reaffirm the longstanding principle that courts in an enforcement action predicated upon an alleged violation of a regulation must determine the meaning of that regulation to determine whether the law has been violated, and those courts may not give a regulation a meaning that would conflict with the regulation's governing statute if another construction is possible.

ARGUMENT

As explained in respondent Duke Energy Corp.'s brief, the EPA's prevention of significant deterioration regulations refer to two different terms: "modification" and "major modification." Every legislative rule defining the

term "modification" has required that a physical or operational change increase the inherent emitting capacity of an existing unit. The term "major modification" has always been defined as a "modification" that increases "source wide" annual emissions. The district court and court of appeals resolved the meaning of the prevention of significant deterioration regulations' repeated reference to "modification." It is in this regulatory context that the jurisdictional arguments about the scope and effect of Clean Air Act § 307 must be analyzed.

I. THE COURT OF APPEALS' FINDING THAT THE CLEAN AIR ACT MANDATES CONSISTENT USAGE OF THE TERM "MODIFICATION" BETWEEN THE PREVENTION OF SIGNIFICANT DETERIORATION AND NEW SOURCE PERFORMANCE STANDARDS PROGRAMS WAS A NECESSARY PART OF ITS REGULATORY ANALYSIS.

A. Courts Deciding Clean Air Act § 113 Civil Judicial Enforcement Actions Must Give The Regulations At Issue Meaning Consistent With the Clean Air Act, Regardless Of Clean Air Act § 307(b).

Upon being presented with the civil judicial enforcement action brought by the government against Duke Energy Corp., the district court and court of appeals had an independent duty to determine the meaning of the regulations that the government accused Duke Energy of violating. In so doing, the court of appeals applied the well-established canon of regulatory construction that regulations should be construed consistent with their governing statutes. This analysis is unaffected by the

court's duty to defer to agency interpretations that are not "plainly erroneous or inconsistent with the regulation," *see Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), and Clean Air Act § 307(b)'s limits on courts' ability to judicially review agency action.

1. Courts Have An Independent Duty To Ascertain The Meaning Of The Law That Governs The Case Pending Before Them.

Courts presented with Clean Air Act civil judicial enforcement actions must ascertain which legal principles govern the proceedings before the fact finder (be it judge or jury) can apply the law to the facts of the action. The government can only impose civil liability on an individual where that individual's conduct violates a statute, or a regulation that has the force and effect of law. A regulation can only have such force if the administrative agency promulgating the regulation exercises the authority Congress delegated it by statute. *See, e.g., Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) (noting that regulations not promulgated through proper statutory means "do not have the force and effect of law and are not accorded that weight in the adjudicatory process."). Under our judicial system, "it is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). This applies whether the governing law is the United States Constitution, *see, e.g., id.*, statute, *see, e.g., Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980), or a regulation promulgated by an administrative agency.

This is not to say that judicial interpretive prerogative to determine the meaning of the law is unlimited. Courts

must generally apply this Court's admonition about the need to defer to an agency's interpretation of its regulations unless the interpretation is "plainly erroneous or inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 414 (1945); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997). *Seminole Rock* deference is justified by the administrative agency's superior competence to understand and explain regulations, the agency's greater political accountability relative to courts (which makes the agency more appropriate than courts to make policy decisions inherent in interpreting regulations promulgated pursuant to delegated legislative statutory power), and the relative competence of courts and agencies in making policy decisions. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 629-30 (1996). As a mandatory discretion doctrine, the *Seminole Rock* principle operates much like the *Chevron* doctrine, *see Chevron USA, Inc. v. Natural Resources Def. Council*, 467 U.S. 837 (1983), preventing judges from substituting preferred interpretations of a regulation for the agency's interpretation.

In order for the *Seminole Rock* doctrine to function, however, it is imperative that courts be given full discretion to address both regulations and the statutes under which these regulations are promulgated. Neither the *Seminole Rock* doctrine nor any other relevant legal precedent compels blind judicial acceptance of the agency's interpretative position. Indeed, it is clear that authority to address the meaning of the regulation itself is necessary to determining whether an agency's interpretation of its rule is consistent with the regulatory text. Moreover, this authority must also extend to the governing statutes,

because courts have a duty to ensure that the agency's interpretation of the regulation does not "run afoul of . . . a federal statute." *Stinson v. United States*, 508 U.S. 36, 46 (1993). As such, courts' duty to address the meaning of regulations to avoid conflict with their governing statutes does not conflict with the *Seminole Rock* deference principle, it enforces it.

This Court recognized in *Seminole Rock* itself that "[t]he intention of Congress . . . in some situations may be relevant in . . . choosing between various constructions." 325 U.S. at 414. This, of course, is not the only instance where *Seminole Rock* deference is unwarranted: courts should not defer to an agency's interpretation of its regulations advanced in litigation if there is "reason to suspect that the [agency's] interpretation [of its regulations] does not reflect the agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462. Often, this is because the agency's interpretation of its regulations has fluctuated. *See N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 539 n.29 (1982) (refusing to defer to agency's interpretation where "there is no consistent administrative interpretation of the . . . regulations").

Where the proper meaning of the regulation is before the court and the agency's interpretation of the regulation is not due *Seminole Rock* deference, courts must independently address the meaning of a regulation. *Commissioner v. Schleier*, 515 U.S. 323 (1995), illustrates this point. In *Schleier*, this Court addressed whether the recipient of a settlement for back pay and liquidated damages under the Age Discrimination in Employment Act of 1967 must include the settlement in his gross income. At issue was an Internal Revenue Service ("IRS") regulation that permitted recipients to "exclude[] from gross

income the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness. . . . through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution." *Id.* at 333 (quoting 26 C.F.R. § 1.104-1(c) (1994)).

In the past, the IRS had interpreted the portion of this regulation permitting exclusion of damages received "through prosecution of a legal suit or action based upon tort or tort-type rights" to supersede the regulatory and statutory requirement that the damages be received "on account of personal injuries or sickness," although it currently interpreted the regulations as requiring both a legal suit for tort-type rights and that damages be received for personal injury or sickness. *See id.* at 329 (quoting 26 U.S.C. § 104(a)(2)), 333 (quoting 26 C.F.R. § 1.104-1(c)). The respondent attempted to exclude back pay and liquidated damages based on the prior interpretation, but this Court disallowed the exclusion. In so doing, however, the Court did not "accord [the Commissioner's] present litigating position any special deference." *Id.* at 333 n.7. Instead, it accepted the Commissioner's position because "she reads the regulation correctly in this case." *Id.* To determine that the Commissioner's interpretation of her regulation was correct, this Court ascertained the correct reading of the regulation, free from the bounds of any deference doctrines.

2. In Determining What The Law Is, Courts Should Accept The Reasonable Construction Of A Regulation That Does Not Conflict With A Federal Statute.

It is a fundamental principle of administrative law that when courts are charged with interpreting regulations, they ought to interpret the regulations to avoid conflict with the regulation's governing statute, provided the regulations can be construed to avoid such a conflict. This principle has been applied by the Supreme Court, *see N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982), and has been followed as binding precedent in at least eight United States Courts of Appeals: the Third Circuit, *see LaVallee Northside Civic Ass'n v. Virgin Islands Coastal Mgmt. Comm'n*, 866 F.2d 616, 623 (3d Cir. 1989) ("[O]ur starting point is to attempt reconciliation of seemingly discordant statutes and regulations. Only where that outcome is not possible do we disregard the regulations."), Fourth Circuit, *see United States v. Duke Energy Corp.*, 411 F.3d 539 (4th Cir. 2005), *cert. granted sub nom., Environmental Def. v. Duke Energy Corp.*, 126 S. Ct. 2019 (2006), Fifth Circuit, *see Steen v. Comm'r*, 508 F.2d 268, 270 (5th Cir. 1975) (reading regulation "in light of its underlying statute," in order "to avoid a construction which brings the validity of the regulation into question"), Eighth Circuit, *see N. Natural Gas Co. v. O'Malley*, 277 F.2d 128, 134 (8th Cir. 1960) (stating that "courts will ordinarily avoid a construction which raises doubt as to the validity of the regulation" where the invalidity would have arisen from inconsistency between the interpretation and statute), Ninth Circuit, *see League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1190 n.8 (9th Cir. 2002) (rejecting agency's "interpretation of the regulation," and instead giving regulation "a construction consistent with its administrative history, case

law, and *the governing statute*") (emphasis added), Tenth Circuit, *see Joy Techs. v. Sec'y of Labor*, 99 F.3d 991, 996 (10th Cir. 1996), *cert. den'd*, 520 U.S. 1209 (1997) ("We refuse to give effect to an interpretation of a regulation which is not reasonable and consistent with the statute that the regulation is meant to implement") (internal quotations omitted), Eleventh Circuit, *see Steen*, 508 F.2d at 270, and District of Columbia Circuit, *see DRG Funding Corp. v. Sec'y of the United States Dep't of Housing and Urban Dev.*, 898 F.2d 205, 209 (D.C. Cir. 1990) (accepting plaintiff's "alternative constructions of the regulation that avoid conflict with [a] statutory provision").[2]

This Court's decision in *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982), is instructive. In *North Haven*, this Court rejected a challenge to the Department of Health, Education and Welfare's ("HEW") regulations under Title IX of the Education Amendments of 1972 because they could permit HEW to terminate all federal education funds to an institution that discriminated against employees in one particular program on the basis of gender. The regulations in question were susceptible to two possible interpretations. The first would permit HEW to terminate *all* federal funds to an educational institution

[2] The admonition that courts should construe regulations to avoid conflicts with statutes has been applied by other United States courts as well. *See, e.g., Exxon Corp. v. United States*, 40 Fed. Cl. 73, 90 (1998) ("[I]f fairly possible, legislative regulations must be construed to avoid conflict with a statute."); *Bhada v. Comm'r*, 89 T.C. 959, 973 (1987) (same); *Carrete-Michel v. INS*, 575 F. Supp. 150, 155 (W.D. Mo. 1983) (rejecting government's construction of regulation in order to avoid statutory questions which would endanger the validity of the regulation); *Fuller Brush Co. v. United States*, 262 F. Supp. 989, 999 (D. Conn. 1966) (construing tax regulation so as not to conflict with the plain language of a statute).

that discriminated against women in any one of its programs. The second would construe the regulations as program-specific. In selecting between these interpretations, the Court stated that it "normally defers to the agency's interpretation" of its regulations, but that "there is no consistent administrative interpretation of the Title IX regulations for us to evaluate" because HEW's "interpretation has fluctuated from case to case, and even as this case has progressed." *Id.* at 539 n.29. Accordingly, this Court interpreted "the regulations [to] conform with the limitations Congress enacted" in the Title IX program. *Id.* at 539. *North Haven* conclusively determines that this Court has blessed courts' ability to interpret regulations consistent with their governing statutes where the regulations' meaning is in question and the *Seminole Rock* deference principle is not appropriate.

Another instructive example of the application of this principle is *DRG Funding*, 898 F.2d 205. In that case, DRG Funding owned numerous mortgages coinsured by the Department of Housing and Urban Development ("HUD"). When borrowers defaulted on several loans, DRG Funding requested that HUD pay the insurance proceeds through debentures, and that interest on the debt instruments should accrue from the date of default. HUD refused to pay interest from the date of default and instead stated that it would pay interest only from the time it settled the insurance claims. While the plain language of the regulations supported DRG Funding's argument, HUD based its refusal to pay on two grounds. First, HUD argued that the "provisions are inconsistent with the general thrust of the entire body of HUD's coinsurance regulations." *Id.* at 207. The court rejected this argument. Second, HUD argued that the plain language of the regulation would contravene

the statutory mandate that a "coinsured lender bear at least 10% of the insured loss when a borrower defaults." *Id.* at 209 (describing 12 U.S.C. § 1715z-9(a)(1)). While the court accepted HUD's objection that its regulations did not provide any mechanism for making the coinsured lender bear 10% of the loss, the court accepted DRG Funding's "alternative construction[] of the regulation that avoid[ed] conflict with that statutory provision" and capped the interest and principle payment at 90% of the loss. As such, the D.C. Circuit interpreted the regulation to conform to a statutory mandate to which the plain language of HUD's regulations did not conform.

3. Clean Air Act § 307 Does Not Alter The Court's Duty To Determine What The Law Is.

Petitioners argue that it would frustrate the purpose of Clean Air Act § 307(b) to permit courts to ascertain the meaning of the EPA's Clean Air Act regulations by referring to the Clean Air Act and the regulations, rather than the regulatory text alone. In essence, Petitioners argue that the policy imperatives of finality and national uniformity reflected in Clean Air Act § 307(b) should override the court's ability in an enforcement action to determine what the law is and, in particular, to give regulations meaning consistent with their governing statute. Irrespective of whether Congress could do this if it so desired, Amici think it is clear that nothing in Clean Air Act § 307(b)'s plain language or legislative history suggests that a court in which a civil judicial enforcement action is pending lacks jurisdiction to determine the meaning of the regulation on which violation liability is premised by reference to the regulation's governing statute.

Clean Air Act § 307(b)(2) states that "*[a]ction of the Administrator* with respect to which review could have been obtained under [Clean Air Act § 307(b)(1)] shall not be subject to *judicial review* in civil . . . proceedings for enforcement." 42 U.S.C. § 7607(b)(2) (emphasis added). According to its very terms, this statute speaks only to "action of the Administrator" and "judicial review." It does not speak to the court's existing duty to address the meaning of regulations before it.

Petitioners' argument proves too much. If the EPA's reading of its prevention of significant deterioration regulations were reasonable and consistent with the Clean Air Act, this Court would defer because it determined that the *Seminole Rock* deference principle applied, not because Clean Air Act § 307 prevented it from determining the meaning of the regulations. It follows that in the instant case, where the *Seminole Rock* deference principle does not apply because the EPA's litigation interpretation is not consistent with the Clean Air Act (and because the Agency's interpretation of its regulations has vacillated), Clean Air Act § 307 likewise does not prevent the court from determining the meaning of the regulations. Simply put, courts entertaining enforcement actions must determine whether the alleged actions occurred, what the regulations allow or prohibit, and whether the alleged actions violate the regulations. All that is at issue in the instant action is the second step – the court's determination of what the regulations mean. In so doing, the court of appeals made this determination by reference to the Clean Air Act's statutory language.

At least one other court of appeals has given regulations meaning consistent with their governing statutes despite the existence of constraints on judicial review

analogous to Clean Air Act § 307(b). In *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002), the Ninth Circuit interpreted the EPA's regulations promulgated under the Federal Water Pollution Control Act dictating what are and are not point sources of water pollution to include aerial insecticide spraying as a point source of pollution. This interpretation required that the Forest Service obtain a permit to spray, and contradicted the Forest Service's interpretation of the regulations, which was based on its consultation with the EPA. In refusing to defer to the EPA's interpretation of its point source regulations, the court accepted the League of Wilderness Defenders' argument that the interpretation was impermissible and stated that the EPA "has some power to define point source and nonpoint source pollution *where there is room for reasonable interpretation of the statutory definition*. However, the EPA may not exempt from [] permit requirements that which clearly meets the statutory definition of a point source by 'defining' it as a non-point source." *Id.* at 1190 (emphasis in original).[3]

In opposition, the Forest Service claimed that the court's interpretation of the point source regulation was prohibited by Federal Water Pollution Control Act § 509, which is identical in all relevant respects to Clean Air Act § 307. The Ninth Circuit rejected this argument, stating that "we do not reach the Forest Service's arguments regarding [Federal Water Pollution Control Act § 509(b)]

[3] While *League of Wilderness Defenders* was a suit between several environmental groups and the Forest Service Department, in relevant part, the Ninth Circuit treated "the two letters and guidance document [on which the Forest Service Department relied] as definitive pronouncements of the EPA." 30 F.3d at 1190.

because we do not invalidate the regulation. Rather, we reject the Forest Service's interpretation of the regulation and give it a construction consistent with its administrative history, case law, *and the governing statute.*" *Id.* at 1190 n.8 (emphasis added). Put another way, the fact that a challenge to the validity of the regulation itself might have been time-barred did not matter because the court was merely discharging its duty to determine the law, not challenging the regulation itself.

League of Wilderness Defenders demonstrates that the canon that courts should give regulations meaning consistent with their governing statutes applies equally to regulations that may not be judicially reviewed because of a statutory bar. Thus, contrary to Petitioners' claims, accepting a construction of the prevention of significant deterioration regulations consistent with the Clean Air Act's plain text is not a means of avoiding Clean Air Act § 307's limitation on the court of appeals' jurisdiction; it is the proper judicial course of conduct whenever an agency attempts to enforce its interpretation of a regulation against a regulated entity in a judicial proceeding.

Indeed, "judicial review," as that term is used in Clean Air Act § 307, refers to a court's ability to overturn particular "action of the Administrator," not its ability to address the meaning of regulations in enforcement actions. This is why the courts, in considering other cases involving Clean Air Act § 307(b), refer to review not as a declaratory function, *see* Henry P. Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 5-8 (1983) (describing the court's role to determine the meaning of the law as a declaratory function), but as a means of determining whether agency action, like legislative rules, are valid. A court exercising the declaratory function does not decide

whether the regulations underlying the action are valid the way that a United States Court of Appeals deciding a petition for review would. *See* 42 U.S.C. § 7607(d)(8) (enumerating the grounds on which courts "may reverse" action of the Administration "in the case of review"). That is, a court determining the meaning of the law governing an enforcement action does not engage in the type of review generally associated with the D.C. Circuit – assessing the facial validity of the regulation under its governing statute, determining whether the agency's policy choices are reasonable, and determining whether the agency's action is arbitrary or capricious. Instead, it determines the meaning of the regulation without exercising any of these judicial tools.

This distinction is supported by case law governing Clean Air Act § 307, which demonstrates that courts deciding a Clean Air Act enforcement action may determine the meaning of the regulations before them, even if they lack the ability to provide the type of relief associated with judicial review. In *Adamo Wrecking Corp. v. United States*, 434 U.S. 275 (1978), for example, this Court considered whether an earlier version of Clean Air Act § 307(b) precluded a defendant in a criminal judicial enforcement action from arguing in its defense that the emission standard for asbestos it allegedly violated was not an emission standard under the plain language of the Clean Air Act. This Court held that the defendant could assert this defense because Clean Air Act § 307 "does not relieve the Government of the duty of proving, in a prosecution under [Clean Air Act] § 113(c)(1)(C), that the regulation allegedly violated is an emission standard." *Id.* at 284. In other words, this Court held that Clean Air Act § 307's bar on judicial review does not preclude defendants

in criminal civil judicial enforcement actions from contesting the government's allegations about the *meaning* of the regulation.

To be sure, this Court's decision in the *Adamo Wrecking* case arose in a criminal prosecution. However, courts' ability to determine the law in a civil judicial enforcement action, with substantial civil penalties being sought – in this case in the *billions* of dollars – should be no more limited. The rule of lenity applied by the *Adamo Wrecking* court in interpreting Clean Air Act § 307(b)(2) applies equally to the punitive criminal and civil aspects of Clean Air Act § 113(c), the statute that forms the basis both for the criminal judicial enforcement action in *Adamo Wrecking* and the civil judicial enforcement action before the Court today. *See United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 525 (1992) (Stevens, J., dissenting) ("The main function of the rule of lenity is to protect citizens from the unfair application of ambiguous *punitive* statutes.") (emphasis added); *United States v. One 1973 Roll Royce By and Through Goodman*, 43 F.3d 794, 801 (3d Cir. 1994) (applying rule of lenity to civil statute that is "punitive in nature").

Even if the rule of lenity does not apply in the instant case, a parallel canon of construction – that Congress must demonstrate "clear and convincing evidence of legislative intent" to restrict the right of an aggrieved person to have a court determine the law before the traditional exercise of that judicial function would be precluded – would still apply. *E.g., Bd. of Governors v. MCorp. Fin., Inc.*, 502 U.S. 32, 44 (1991). Applying either canon in this situation leads to the same conclusion this Court reached in the *Adamo Wrecking* decision: that the district court and court of

appeals had jurisdiction to determine the meaning of the prevention of significant deterioration regulations.[4]

4. Construing Regulations To Avoid Conflicts With Statutes Ensures That Agencies Do Not Exceed Their Delegated Powers.

In addition to being fully supported by this Court's jurisprudence, construing regulations to avoid conflict with their governing statutes is compelling regulatory policy. Courts ensure that an administrative agency's delegated power stays within its proper statutory bounds when they give the regulations at issue in an action meaning consistent with their governing statute. The general principle underlying deference to administrative agencies is that "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2699 (2005). A legislative rule may be susceptible to multiple interpretations, not all of which are consistent with the governing statute. As long

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[4] This conclusion comports with the principle that Article III courts have jurisdiction to determine their jurisdiction. *See, e.g., United States v. United Mine Workers*, 330 U.S. 258, 291 (1947). A district court entertaining a civil judicial enforcement action would lack jurisdiction to determine whether a legal argument raised by the defendant in a civil judicial enforcement action were a permissible alternative interpretation of the regulation, or a prohibited attack on the regulation itself, if the court could not itself determine the meaning of the rule. In other words, if the court of appeals were precluded from determining the meaning of the regulation, it could not determine that it lacked jurisdiction. This result underscores Petitioners' fundamental misreading of Clean Air Act § 307.

as the administrative agency's actions under the regulation are consistent with the statute, it does not exceed its statutory delegation. However, when the administrative agency brings an action under the regulation that exceeds the agency's statutory authority, this principle allows courts to ensure that the agency's action proceeds under the terms of the delegation, while still giving effect to the critical policy decisions that the agency made when it promulgated the regulation itself.

Moreover, courts create disincentives for agencies to change legislative rules without undergoing notice and comment rulemaking procedures by determining the meaning of regulations at issue consistently with the governing statutes. As a practical matter, agencies oftentimes attempt to advance interpretations or reinterpretations of legislative rules that are the functional equivalent of a new rule. *See, e.g.*, *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997); *Hoctor v. United States Dep't of Agric.*, 82 F.3d 165, 169-70 (7th Cir. 1996). When courts determine the meaning of the law governing an action, however, it becomes less likely that regulated entities will be subject to these aberrant interpretations or reinterpretations.

Finally, according unexamined deference to agencies' interpretations of their regulations is antithetical to our constitutional structure, undermining the legitimacy of the administrative state. *Cf.* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 631 (1996) ("[P]ermitting agencies both to write regulations and to construe them authoritatively . . . effectively unifies lawmaking and law-exposition – a combination of powers decisively rejected by our constitutional structure."). This is

doubly the case when the agency's interpretation of its regulations is not merely a strained reading of the regulatory text, but is inconsistent with the governing statute. This Court should not lightly displace the court's fundamental role – declaring the meaning of the law in cases before it. Instead, it should reaffirm the long-standing principle that courts should interpret regulations consistent with their governing statutes.

B. The Court Of Appeals Properly Interpreted The EPA's Prevention Of Significant Deterioration Regulations Not To Conflict With The Clean Air Act.

The gravamen of Petitioners' arguments is that by holding the EPA's litigation interpretation of its prevention of significant deterioration rules up to the Clean Air Act's plain language, the court of appeals' reasoning amounted to an impermissible attack on those regulations. However, the court of appeals simply accepted the EPA's contemporaneous construction of the prevention of significant deterioration regulations because it is consistent with the Clean Air Act's plain language and the regulations themselves. As such, the court of appeals' analysis fits squarely into the proper role of a court adjudicating a civil judicial enforcement action. The fact that applying this law to the projects at issue herein did not lead the court of appeals or district court to find a violation of the prevention of significant deterioration program says nothing about the court of appeals reasoning, only about the weakness of the government's case.

1. The Court Of Appeals Expressly Stated That It Was Addressing The Meaning Of The Prevention Of Significant Deterioration Regulations, Not Invalidating Them.

The court of appeals decision indicates that it understood its role in this case – to determine the meaning of the EPA's prevention of significant deterioration regulations in light of the Clean Air Act and the regulatory text. The court of appeals directly stated the question it was answering, which was the precise question raised by the EPA in its brief: "whether [the EPA] 'can interpret the statutory term modification under PSD differently from how' it has interpreted that term under NSPS." *United States v. Duke Energy Corp.*, 411 F.3d 539, 549 n.7 (4th Cir. 2005). Here, the court of appeals' answer was an unambiguous no, "because Congress mandated that the PSD definition of 'modification' be identical to the NSPS definition of 'modification.'" *Id.* at 547. Having determined the meaning of the Clean Air Act, the court of appeals was thus presented with a second question: whether the prevention of significant deterioration regulations could be interpreted consistently with the new source performance standards regulations. The court of appeals answered this question in the affirmative, stating that "the PSD regulations can be interpreted consistently with pre-existing principles – the NSPS regulations – as the district court demonstrated *and as the EPA's Director of the Division of Stationary Source Enforcement twice opined shortly after the promulgation of the PSD regulations.*" *Id.* at 549 n.7 (emphasis added).

After answering this question by reference to the district court's opinion and the EPA's applicability determinations, the court of appeals did not need to spend voluminous pages hashing out whether the EPA's contemporaneous interpretation, adopted by the district court in a lengthy and rigorous opinion, was closer to the text of the prevention of significant deterioration regulations than the EPA's litigation interpretation.[5] *See id.* at 545-46 (describing district court's regulatory analysis). It is in this sense that "the language and various interpretations of the PSD regulations, on which the district court partially based its holding and which the parties exhaustively discuss, are largely irrelevant to the proper analysis of this case." *Id.* at 547 n.3. That is, in light of the statutory mandate, plausibility is enough; there was no need to engage in a pedantic exposition of each provision of the lengthy prevention of significant deterioration regulations.

Contrary to Petitioners' assertions, the court of appeals simply did not review the validity of prevention of significant deterioration regulations, the "judicial review" precluded by Clean Air Act § 307. And the court of appeals properly recognized that it could not do so, stating that "no question as to the validity of the PSD regulations is (or could be, *see* 42 U.S.C. § 7607(b)), presented here" and that the "PSD regulations remain fully intact and enforceable." *Id.* at 549 n.7. Instead, the court of appeals merely fulfilled its responsibility to say what the law governing this

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[5] This analysis does not mean that Amici believe that Duke Energy Corp.'s regulatory interpretation is further from the text of the prevention of significant deterioration regulations than the government's interpretation.

enforcement action is, accepting the EPA's contemporaneous interpretation because it was consistent with the Clean Air Act and the Petitioners' and the EPA's litigation interpretations were not.

2. The Court Of Appeals' Decision Does Not Render The Prevention Of Significant Deterioration Regulations Unenforceable Or Contradict The Text Of The Regulations.

Petitioners alternately argue that the court of appeals' decision violated Clean Air Act § 307 because: (1) the prevention of significant deterioration regulations are now unenforceable, or (2) the prevention of significant deterioration regulations are not susceptible to a construction consistent with the statute. Neither contention is meritorious.

The argument that the prevention of significant deterioration regulations in effect at the time of the activities at issue in the instant case are unenforceable can be disposed of simply by comparing the case herein with the pending enforcement action against the American Electric Power Company, *see United States v. Am. Elec. Power Co.*, No. C2-99-1182 (S.D. Ohio) (stayed pursuant to Order of May 22, 2006 pending the disposition of the instant case). There, the government argues that certain activities "constituted modifications and thus required NSR permits." *See* Plaintiff's Proposed Conclusions of Law ¶ 249, *Am. Elec. Power Co.* (S.D. Ohio Sept. 1, 2005). That is, these projects required preconstruction permits even though "the modification definition was to be construed consistently with the existing NSPS rules, which defined emission rate in kilograms per hour." *Id.* ¶ 251. It

is clear that, under the court of appeals' decision, Duke Energy (or any other utility in the footprint of the Fourth Circuit) would be liable under the prevention of significant deterioration regulations if it conducted activity equivalent to the activity that the government alleges American Electric Power conducted. The fact that the prevention of significant deterioration regulations would not reach all of the conduct the government wishes them to reach does not render them unenforceable; it only prevents a legally unsupportable application of these regulations.

Petitioners' argument that the prevention of significant deterioration regulations cannot be read consistently with the new source performance standards regulations rests on similarly flimsy grounds. *See, e.g.*, Brief of the United States at 19-20. The government itself has interpreted the "major modification" definition in its prevention of significant deterioration regulations in three distinct ways. The first way is embodied in applicability determinations issued in the regulations' immediate aftermath. *See* Letter from Edward E. Reich, Director of Stationary Source Enforcement, EPA, to Amasjit S. Gill, Gas Turbine Div., General Electric, at 1 (June 24, 1981) (stating that "PSD applicability [at a source that had begun normal operations] is determined by evaluating any change in the emissions rates caused by" the change); Letter from Edward E. Reich, Director of Stationary Source Enforcement, EPA, to Charles Whitmore, Chief of Technical Analysis, EPA Region VII (January 22, 1982) (stating that an operational change that increases the number of hours that a source can operate in a year does not constitute a "major modification" under the prevention of significant deterioration regulations); Memorandum from Edward E. Reich, Director of Stationary Source Enforcement, EPA, to

Michael M. Johnston, Chief of Air Operations, EPA Region X, at 3 (July 28, 1983) (stating that "any increase in actual emissions [following a physical change] . . . which will result from the increased capacity provided by the larger [component] must be considered for the purposes of PSD applicability"). The court of appeals expressly selected this contemporaneous interpretation. *See Duke Energy*, 411 F.3d at 547.

Later, the government interpreted the prevention of significant deterioration regulations' definition of "major modification" to contain an "actual-to-potential" test for existing sources that have begun normal operations and have not undertaken projects that constituted "modifications" under the new source performance standards program. *See Wis. Elec. Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1989). The government advanced this interpretation of its prevention of significant deterioration regulations in the proceedings below. *See United States v. Duke Energy Corp.*, 278 F. Supp. 2d 619, 640 n.17 (M.D.N.C. 2003) ("The EPA in its briefing argued that . . . the "actual-to-potential" test should apply to Duke Energy's units [that were not NSPS "modifications"]. . . . During the summary judgment hearing on July 18, 2003, the EPA indicated that it would not seek application of the actual-to-potential test. . . ."). Finally, the government adopted the "actual-to-projected-actual" test for existing sources that have begun normal operations and have not undertaken projects that constituted "modifications" for the new source performance standards program. It is this interpretation that the government now disingenuously claims, in the face of egregious agency vacillations *including in the proceedings below*, as the *only* "reasonable" reading of its prevention of significant deterioration regulations. *See*

Brief of the United States at 20 ("The only reasonable reading of the PSD regulations is that a physical change that increases a source's hours of operation is a 'modification.'").

This Court should reaffirm the longstanding principle that courts should not give meaning to a regulation that would conflict with the regulation's governing statute. The Fourth Circuit's decision lacks neither reason nor precedent in this regard. Indeed, it is solidly rooted in both. Reading the prevention of significant deterioration regulations consistent with the plain language of the Clean Air Act Amendments of 1977, which mandates that the EPA interpret "modification" consistently in the prevention of significant deterioration and new source performance standards programs, the court of appeals adopted the only reasonable interpretation of the regulations: the interpretation advanced by Duke Energy Corp. and by the EPA immediately following the prevention of significant deterioration regulations' promulgation. To the extent this is error, and Amici strenuously contend it is not, it is error on the merits of the dispute, not because the court's decision regarding the meaning of the regulation constitutes judicial review prohibited by Clean Air Act § 307.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth by Duke Energy Corp. and its Amici, the judgment of the court of appeals should be affirmed.

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IN THE

Supreme Court of the United States

ENVIRONMENTAL DEFENSE, *et al.*,
Petitioners,

v.

DUKE ENERGY CORPORATION,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF MANUFACTURERS ASSOCIATION WORK GROUP AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT DUKE ENERGY CORPORATION

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40 C.F.R. § 51.100 (1987) 6

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40 C.F.R. § 51.166(a)(4) 27, 29

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40 C.F.R. § 52.21(b)(2) (1978) 6

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INTEREST OF *AMICUS*

The Manufacturers Association Work Group (hereafter "Associations") encompasses trade associations representing manufacturers in their respective industries on matters affecting their businesses.[1] The Associations' members manufacture, produce, refine and transport an array of products in virtually every state in the nation. The outcome of this case will significantly affect the members because the New Source Review ("NSR") rules at issue here apply not just to electric utilities but also to all manufacturing facilities in the United States. These rules have historically applied to projects the Associations' members have undertaken, and in many states, they continue to apply today.[2] Moreover, the Associations' members have been and continue to be subject to enforcement actions by the Environmental Protection Agency ("EPA") under the rules at issue in this case.

In addition to being current or potential subjects of enforcement proceedings, the Associations' members have extensive experience relevant to the resolution of this petition, specifically with the:

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[1] All parties have consented to the filing of *amicus* briefs in letters that are on file with the Clerk. Counsel of record for Manufacturers Association Work Group, Charles H. Knauss, certifies pursuant to Supreme Court Rule 37.6 that this brief was not authored in whole or in part by counsel for a party and that no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief. The Associations consist of the Alliance of Automobile Manufacturers; American Chemistry Council; American Forest & Paper Association; American Gas Association; American Petroleum Institute; Council of Industrial Boiler Owners; Interstate Natural Gas Association of America; National Association of Manufacturers; Chamber of Commerce of the United States of America; National Petrochemical & Refiners Association; National Oilseed Processors Association; Corn Refiners Association; and the National Cotton Council of America.

[2] While EPA revised its NSR rules in 2002, those rules have not yet been adopted and approved into state implementation plans throughout the country. Therefore, the 1980 rules continue to apply in many states where the Associations' members operate facilities.

- construction and operation of industrial facilities;
- types of activities necessary for safe, efficient and reliable operation of those facilities; and
- historical application of EPA's NSR program.

Through this experience, the Associations bring a broader context to the dispute this Court must address. An understanding of how plants are designed, constructed, and maintained and operated throughout their lives is essential for an accurate and complete consideration of the issues presented.

As discussed below, the Court should affirm the ruling of the U.S. Court of Appeals for the Fourth Circuit because it is consistent with a plain reading of the 1980 regulations and the language and structure of the Clean Air Act ("CAA" or the "Act"). Adopting the Environmental Group Petitioners' view could be devastating to American industry because activities that are and have been common industrial practice could be viewed as having triggered the requirement for sources to obtain NSR permits, even though no "modification" of their permitted operations has occurred. Affirming the Court of Appeals would categorically clarify that such commonplace projects are not subject to NSR.

SUMMARY OF ARGUMENT

The lower court's decision not only reflects EPA's longstanding interpretation of its NSR regulations but also is consistent with the way that manufacturers have designed and operated their plants in accordance with these regulations.

As the Associations demonstrate below, the normal course of business operation of industrial plants mandates that they be maintained and that their efficiency be optimized over time. Moreover, operation of an industrial facility in a competitive environment requires constant activity to accommodate changes in product mix or to allow for newer versions of products to be timely introduced.

In part II, below, we describe four examples of common and frequent activities at industrial plants that, under Petitioners' view of the law, would require NSR analysis. The examples include: (1) adjustments or "tweaks" to consumer product manufacturing processes (p. 12); (2) repair and replacement of gas turbine components (p. 14); (3) equipment alteration at grain elevators and other facilities (p. 15); and (4) engineering adjustments to paper mill fuel delivery systems (p. 16). Petitioners' interpretation would require these commonplace activities (and hundreds of others like them) to undergo NSR analysis and potentially a permitting process—typically lasting more than a year—even if their actual hourly emissions rate is unchanged and emissions stay below permit limits that have *already* been reviewed for compliance with air quality requirements.

These types of activities have not in the past been considered to trigger NSR inquiries, in part because many were not considered "modifications" under the New Source Performance Standard ("NSPS") program. As the lower court recognized, Congress defined "modification" under NSR as identical to the NSPS program definition. 42 U.S.C. §§ 7411, 7479(2)(C).

Petitioners and their *amici* claim that the lower court ruling would lead to increased emissions and severe air quality impacts. These claims have no basis in reality. Section 110 of the CAA requires each state to develop a State Implementation Plan ("SIP") for attaining national ambient air quality standards ("NAAQS"). Each state has complied with this directive and SIPs have been approved by EPA and implemented without any reliance on NSR permitting as the basis for achieving the NAAQS. Indeed, any emissions from manufacturing plants were permitted and accounted for by the states in their SIP planning process.

ARGUMENT

ENVIRONMENTAL PETITIONERS' VIEW OF THE LAW CANNOT BE SQUARED WITH THE STATUTE OR GENERAL MANUFACTURING OPERATION.

The CAA vests the primary responsibility for achieving air quality standards with the states. Section 110 of the Act allows the states substantial discretion to tailor their air emission control programs to meet the NAAQS consistent with local concerns. *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 470 (2001). Section 110(a)(2) *of the CAA as it existed in 1980* established the requirements for state agencies to develop implementation plans to achieve the NAAQS in relatively broad terms. In so doing, it listed eleven requirements in subparagraphs (A) through (K), beginning with the overarching broad directive that each state submit to EPA a plan to implement the NAAQS and provide for attainment "as expeditiously as practicable" and to include "emission limitations ... and such other measures as may be necessary to insure attainment and maintenance" of such standards. SENATE COMM. ON ENV'T AND PUB. WORKS, 95TH CONG., LEGISLATIVE HISTORY OF THE CAA AMENDMENTS OF 1977 ("1977 Leg. History"), § 110(a)(2)(A)-(B), at 23-24 (1978) (current version at 42 U.S.C. § 7410(a)(2)(A)-(B)).[3]

In addition to the broad directive that states take the steps necessary to achieve the NAAQS, Congress included a requirement for SIPs to regulate the construction, modification and operation of stationary sources and, as a *subset* of that SIP element, to establish a separate permitting program for construction and modification of major emitting facilities as provided in parts C and D of Title I. *Id.* § 110(a)(2)(D), at 24 (current version at 42 U.S.C.

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[3] Additional SIP requirements were included in Section 172 (for nonattainment areas), 42 U.S.C. § 7502, and Section 163, 42 U.S.C. § 7473 (for certain pristine areas).

§ 7410(a)(2)(D)).

It is the meaning of the term "modification" under parts C and D and former Section 110(a)(2)(D) that is at issue in this case.[4] In establishing the requirements of parts C and D in the 1977 amendments, Congress did not start with a clean slate; it relied on an established regulatory program—the NSPS program—which had been in existence for nearly a decade. Under the amended statute, the Act (1) continued to require new plants and "modifications" of existing plants to meet "new source performance standards,"[5] and also (2) required "major" new emitting facilities and modifications of those facilities to meet the additional requirements of NSR, both in areas that comply with air quality standards and in areas that do not.[6]

Importantly, Congress chose not only to continue to utilize the same definition of "modification" for purposes of determining when both NSR and NSPS are triggered for an existing facility, but expressly stated that "modification" for NSR has the "meaning" and "use" it has under the NSPS program. 42 U.S.C. §§ 7479(2)(C), 7501(4). When EPA issued its rules implementing the NSR program, after the CAA was amended in 1977, it continued to use a regulatory concept called "major modification" (originally introduced in a 1976 interpretive ruling on nonattainment NSR), based

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[4] When Congress amended Section 110 in 1990, it expanded and refined the requirements for SIPs but did not add any requirements related to parts C and D permits. SENATE COMM. ON ENV'T AND PUB. WORKS, 103D CONG., LEGISLATIVE HISTORY OF THE CAA AMENDMENTS OF 1990, § 110(a)(1), at 32 (1993).

[5] 1977 Leg. History § 111(a)(1), at 35 (current version at 42 U.S.C. § 7411(a)(1)).

[6] In areas that do not comply with the NAAQS, NSR is frequently referred to as "nonattainment NSR," while it is called "PSD" (prevention of significant deterioration) in areas that comply. *New York v. EPA*, 413 F.3d 3, 12-13 (D.C. Cir. 2005). The present case concerns PSD areas rather than nonattainment areas, but for purposes of the legal analysis, the difference is unimportant, and we shall use the term "NSR" to refer to "new source review" in both types of areas.

on whether a "modification" caused source-wide or plant-wide increases in annual emissions from an entire stationary source above threshold levels. 40 C.F.R. §§ 52.21(b)(2) (1978), 51.24(b)(2) (1978); 40 C.F.R. § 52.21(1980); 40 C.F.R. § 51.24(b)(2) (1980) (recodified as 40 C.F.R. § 51.166(b)(2) in 1987). "Modification" continued to be defined by EPA as it had always been defined under NSPS. 40 C.F.R. §§ 52.01(d), 51.100 (1987).

EPA's claim that it has discretion, and exercised that discretion, to define "modification" differently for the NSR and NSPS programs flies in the face of plain statutory and regulatory language. The fact is that EPA has never defined the term "modification" differently under NSPS and NSR, but rather created a regulatory term limiting NSR review to only those "modifications" that are also "major," as determined by source-wide netting and the significance levels. The differences EPA cites between the NSR and NSPS programs relate solely to requirements that ensue only *after* the program applies,[7] not to the threshold determination as to whether a "modification" has occurred.

I. NSR, if Applied as Petitioners Argue, Would Have Led to Serial NSR Permit Requirements for Manufacturing Facilities and Rendered Most of the 1990 Amendments to the CAA Unnecessary.

The lower court held that only an NSPS "modification" can trigger an NSR "major modification" analysis.

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[7] The NSR program, as enacted in 1977, required a facility to undergo an individualized review process, in which the control technology and its air quality impacts are scrutinized, 1977 Leg. History § 165(a)(3), at 88 (air quality review), *Id.*, § 165(a)(4), at 88 (control technology review) (current version at 42 U.S.C. § 7475(a)), while the NSPS program as implemented by EPA since its enactment in 1970 requires the plant to comply with control technology requirements set on a national basis based on EPA's determination of the best "adequately demonstrated" control technology, *Id.*, § 111(a)(1), at 35 (current version at 42 U.S.C. § 7411(a)(1)).

Petitioners and EPA would have this Court believe that all air quality would fail to meet national standards if that decision is upheld. The language of the rules and the statute, and the facts, belie this prediction. Under Petitioners' view, facilities would have triggered NSR permitting requirements quite frequently, many facilities on a yearly or bi-annual basis. Any uptick in product demand that is coincident with a physical activity at the plant would then be deemed the origin of a potential increase in annual emissions. Under this view, facilities would have to face the paradox of having undertaken projects that were not "modifications" but could nonetheless be "major modifications."

Title I contains a wide range of tools for states to achieve NAAQS. Only one part of that is NSR. If Congress or EPA had believed that the NSR program would be as broadly applicable as Petitioners and EPA now advocate in this litigation, the EPA and President George H.W. Bush would have found no reason to draft and send to Congress proposed legislation in 1989 that, after much debate, became the Clean Air Act Amendments of 1990. These Amendments imposed significant new emission mandates on existing air emission sources, none of which would have been necessary under EPA's and Petitioners' rationale advocated before this Court. The litigation theory espoused by EPA and Petitioners would obviate the need for the 1990 Amendments' acid rain program to reduce nitrogen and sulfur oxides from existing utility sources and the Section 182 ozone nonattainment area provisions because existing sources would already have been subjected to NSR (by frequently undertaking projects that were not NSPS "modifications" but nonetheless "major modifications" under their view) and, thus, any controls under the acid rain or ozone programs would have been redundant with existing controls.

In sum, Petitioners seek to attribute to NSR a purpose so broad that it would erase the remainder of Title I, making it the primary vehicle through which CAA emission reductions were and are to be achieved. These claims ring hollow given

the narrower purpose that Congress itself gave the major NSR program when it was enacted, describing it as a mechanism "to permit States to allow continued growth or expansion in nonattainment areas, so long as this growth or expansion is undertaken in a manner consistent with the goals and objectives of the Clean Air Act." H.R. Rep. No. 95-294, at 210 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1077, 1289 (emphasis added). Indeed, EPA explained that:

> unlike the control measures required by Section 172(c)(1) and (c)(6), major NSR is not a measure to reduce emissions to assure attainment; nor did Congress identify the program as a control measure to help areas achieve attainment "as expeditiously as practicable." Rather, Congress intended that the effectiveness of major NSR in minimizing the impact of increased emissions should be considered together with the State's other SIP measures to assure, consistent with Section 172(a)(2), that emissions from new sources will be consistent with [reasonable further progress requirements].

70 Fed. Reg. 17,018, 17,022 (proposed Apr. 4, 2005).[8]

The statutory structure further indicates the narrower role of NSR in the "air quality toolbox." The Act directs the states to include a wide variety of measures in their SIPs to achieve NAAQS and many of these requirements address emissions from existing facilities. For example, Section 172 required states: to provide for implementation of all reasonably available control measures ("RACM") as

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[8] This reasoning was adopted by EPA in its final action on reconsideration. 70 Fed. Reg. 39,413 (July 8, 2005). EPA further stated that the offset ratio requirement and lower major stationary source thresholds of the nonattainment NSR program were not included to generate emissions reductions but rather to provide a buffer to compensate for under-projections of growth in state planning. *Id.* at 39,420.

expeditiously as practicable; to require reasonable further progress, including reduction in emissions from existing sources as may be obtained through adoption, at a minimum, of reasonably available control technology ("RACT"); and to impose emission limitations, schedules of compliance and such other measures as are needed to attain the NAAQS expeditiously. 42 U.S.C. § 7502. Just one part of this laundry list is the regulation of "new" and "modified" major stationary sources through a permit program referred to as NSR. If Congress had intended NSR to play the central role in attaining air quality by being triggered almost immediately after enactment for every manufacturing plant, when those plants undertook projects that were never understood to be NSPS "modifications," it certainly would have devoted more than a few words in the list to it and stated so explicitly.[9] In any event, if NSR controls were expected to apply to virtually every existing unit in a nonattainment area shortly after the 1977 Amendments, it would have made no sense for Congress to require in Section 172 RACT, which is less stringent than the controls required under NSR, for those same units.

II. The Significant Investment That is Required to Build Manufacturing Facilities Means They Must Be Designed to Operate for Many Years, in a Variety of Modes, and at the Highest Efficiency Possible.

Construction of a new industrial plant, be it a paper mill, an automobile assembly plant, or a foundry, requires a significant investment, often in the hundreds of millions of dollars. When plants are built, SIPs provide for issuance of air quality permits that require state-of-the-art controls, also a significant investment. Because of the capital required to build manufacturing facilities, they are designed to operate for many years and, often, in a variety of modes. If the Petitioners' view of the law is accepted, then plants

[9] *Cf.* 42 U.S.C. § 7419 (more than 1500 words devoted to smelters).

constructed in 1979 that obtained major NSR permits and that operated as designed could have been subject to NSR several times more since 1979 merely because of normal maintenance and repair activities or product and process refinements ("tweaks") that were anticipated to occur when the facilities were originally constructed. Petitioners' baseless argument also conflicts with the clear recognition by permitting agencies that components of such facilities need to be maintained, repaired and replaced as they deteriorate and that various products might be made with a given set of equipment.

Obtaining the SIP air quality permits necessary to build a new plant (or process) requires a comprehensive application, with detailed emissions analyses. The permitting process typically takes over a year and involves the public through notice and comment procedures. Once a permit is issued, the company is permitted to construct and operate its facility based on its application. 40 C.F.R. § 52.21(r)(1). Companies justifiably rely on these permits to define the scope of their allowed emissions. After all, they have indicated maximum emissions profiles in their permits and been subject to permit review based on those emissions. The states also have relied on these permits in their SIP planning in establishing the maximum amount that a source can emit and its maximum impact on local air quality.

In contrast, Petitioners' reading of the statute and regulations would mean that companies cannot rely on permits they obtain that reflect their actual emissions capability. Instead, Petitioners would require permits but not allow a company to operate at the levels permitted therein because it is maintaining and operating its facilities as required by the permit up to anticipated and allowed permit levels. This view of the law undermines the permitting process itself.

Indeed, in seeking these permits, companies do not look to the next year's demand. They look to the range of potential fluctuations in demand and product mix over a long

planning period (in decades), and they obtain permits to allow for these fluctuations. As a result, state permitting agencies use continuous operation at maximum capacity as the basis for permits to ensure the full air quality impact of a plant is considered before it is allowed to be built. In actual operation, this optimal level is rarely achieved both due to demand and equipment outages that may occur for various reasons. Companies devote considerable effort to small improvements designed to bring their plants closer to stoppage-free operation, by fine-tuning and optimization of operations and repairs or replacements as needed to improve reliability of production equipment. Such activities are intended both to decrease unscheduled stoppages and to increase the time between scheduled maintenance. These improvements are not (and never have been) NSPS "modifications" because they do not affect actual hourly emissions rates, but only hours of operation.

In addition, most companies build and permit plants to operate for many years while making a variety of products or variations on the same product. When a plant is built, state-of-the-art controls are installed, at considerable expense. Under Petitioners' view of the law, companies would not be allowed to recoup these investments but instead could be subject to repeated technology reviews under NSR, even though operations remain within the scope and emission levels of their permit and actual capability, without regard to the number of hours they operate.

To the contrary, Congress, in enacting the NSR program, and EPA, in promulgating the 1980 regulations, did *not* create serial technology reviews of manufacturing operations. This is the very reason that EPA has historically looked to whether the actual emitting capability (measured on an hourly or similar basis, unaffected by increased hours of operation) has changed before inquiring into the impact on actual annual emissions from a plant--*i.e.*, whether there would be a "modification" under the NSPS rules before analyzing whether that "modification" would be a "major

modification" that involved a significant increase in annual emissions under NSR.

This approach made sense because as long as the actual emissions capability remains stable, the plant is operating as intended. It is what it was permitted to be, and has not been transformed into a new operation that warrants a new review for control technology. The following examples are illustrative of the types of activities that companies undertake consistent with their permits and actual operating capability. In each case, the activity would not be considered a modification under the NSPS program (*i.e.*, would not increase the emissions rate or otherwise be excluded from the NSPS definition of "modification"), but could allow a plant to operate more efficiently or reliably in a manner consistent with its permitted and constructed capacity.

Example 1: Consumer Product Manufacturing Tweaks and Adjustments. In the United States, industrial facilities manufacture many products made of metal, plastic and composites, including trucks, cars, boats, trailers, buses, appliances, furniture and more. To ensure the proper look and durability (*e.g.*, to prevent corrosion), these facilities shape and apply protective and preparatory coatings and finish paints to the metal to achieve a marketable, final product.[10] Consider a plant that installs a new coating line and obtains a major NSR permit. The major NSR permit includes emission limits and control requirements and the state agency issues it based on the required air quality analyses. After that permit is issued, the plant begins production.

This is when the tweaking process begins. Plant engineers, marketing staff, and other personnel make

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[10] The primary emissions from coating operations are volatile organic compounds ("VOC"), an ozone precursor, and particulate. Permits typically require sources to reduce VOC through use of control devices or low VOC coatings and particulate through use of controls.

incremental product or production process changes. These changes can be reflected in the look and design of the product, the colors, durability and texture of the coatings, and even the coating nozzles and applicators. They are made for a variety of reasons, *e.g.*, to make the product more appealing, to lower the cost of producing it, to make it more durable, to solve quality problems, to reduce the amount of paint required, *etc.* None of these tweaks constitutes an activity that would change the nature of the coating line, change its permitted emission limits, or change its actual emitting capability. But, if the tweaks are successful, people might buy more of the product, and the facility might be able to reach the production its marketing people projected when the project was approved. In addition, the *annual* emissions might increase because the plant is making more product, *i.e.*, plant operating hours increase.[11] Still, the plant is the same as permitted—the coating line moves parts along a conveyor while robotic applicators spray coatings and finish paint, and emissions are routed to a control device.

The emissions reviewed when the major NSR permit issued still represent the capability of the unit. Under Petitioners' view, each of these tweaks, from a larger or smaller product size to a different shape that might require more or less paint—to a paint applicator design improvement—to a more protective undercoating that prevents corrosion from salt, would require analysis of whether there was a "major modification" that increased annual emissions, and triggered major NSR. This would be so, under Petitioners' view, even though there has been no increase in the unit's hourly emitting capability and, therefore, no "modification" as defined in the NSPS.

The tweaking and adjustment process occurs on every plant operating day of every month of every year. Tweaking

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[11] In rough economic times or if this plant's tweaks make its product that much more appealing to the public, a competitor plant might even shut down, leading to a shift of production to this plant.

is the marketer's job. It is the plant manager's job. It is the plant and design engineers' job. It is also something that companies contemplate when they obtain a permit, as long as they do not increase their actual hourly emitting capability. EPA has never suggested that these commonplace and necessary tweaks represent a "major modification" under NSR, presumably because the tweaks would not be "modifications" in the first instance as defined in the NSPS. Under the view advanced by Petitioners, tweaks would be subject to repeated analysis to determine whether they were "major modifications" even though the emissions had already been reviewed in a major NSR permit, and the coating line's actual emitting capability had not changed. It defies common sense to assume Congress or EPA intended NSR to apply (or even an analysis of whether it applies) repetitively to tweaks.

Example 2: Repair and Replacement of Gas Turbine Components. Consider the replacement of major components of gas turbines used in power generation or industrial applications, like natural gas pipelines. During a turbine's life, components like stator blades, turbine nozzles, buckets, fuel nozzles, seals, and packings are expected to be replaced. These are the same types of components the replacement of which, EPA argued below and Environmental Group Petitioners argue here, turned Duke's generating units from "existing" into "new" facilities. Replacing these components, however, does *not* convert an existing turbine into a "new" one in any sense.[12] Indeed, the

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[12] STAPPA/ALAPCO claims that no changes would be subject to NSR if the lower court decision is upheld. This is patently false. If a company replaces components in a way that is an NSPS modification, NSR permitting would be required if the modification was "major." For example, if a company replaces a turbine section in a way that allows the unit to burn more fuel, increases the output, and thereby generates higher hourly emissions, the unit would have made a "modification" as defined in the NSPS and analysis of whether a "major modification" has occurred would need to ensue. If annual emissions were projected to increase by more than significance levels in the rules, the company would have made

unit's manufacturer will typically *condition the emissions performance warranty* on the replacement of these parts according to a schedule specified in the manual for the unit. After the replacement, the turbine continues to be what it was always able to be and what it was permitted to be.

In issuing the gas turbine NSPS, EPA recognized that such activities are *not* NSPS modifications. Specifically, EPA explained "replacement of stator blades, turbine nozzles, turbine buckets, fuel nozzles, combustion chambers, seals, and shaft packings" are not modifications under the NSPS.[13] Replacing these components is in no sense a modification of the emissions unit, much less a "major" one.

Example 3: Activities Excluded from the NSPS Modification Definition for Grain Elevators. Many NSPS define "modification" as not including specified activities. For example, grain elevators, which are buildings or complexes of buildings for storage and shipment of grain, are regulated under Subpart DD of the NSPS rules. EPA issued a NSPS for these facilities in 1978. 43 Fed. Reg. 34,340 (Aug. 3, 1978). In so doing, the Agency explicitly determined that the addition of gravity loadout spouts to existing grain storage or grain transfer bins, installation of automatic grain weighing scales, replacement of motor and drive units driving existing grain handling equipment, and installation of permanent storage capacity without an increase in hourly grain handling capacity are not modifications. EPA noted in issuing the final rule that these alterations "frequently occur" and that the impact of considering "these alterations as modifications, subject to compliance with the [NSPS], was viewed as unreasonable." *Id.* at 34,344-45.

It would be truly remarkable for EPA to state that

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a "major modification," and NSR would apply.

[13] *See* EPA, *Standards Support and Environmental Impact Statement Vol. 1: Proposed Standards of Performance for Stationary Gas Turbines*, EPA-450/2-77-017a, at 5-6 (Sept. 1977).

subjecting such activities to NSPS modification requirements is unreasonable and just a short time later consider subjecting such alterations to NSR major modification analysis to be reasonable. Yet, under Petitioners' view of the law, these "frequent" activities that EPA had determined not to be "modifications" would nonetheless be subject to NSR analysis to determine if they were "major modifications." Surely if EPA had considered these activities potentially subject to NSR analysis, there would have been some statement so indicating and an analysis of the rule's economic impact.[14]

Example 4: Debugging Bark Handling and Delivery System to a Biomass Bark Boiler at a Paper Mill. Paper mills need to remove the bark from wood ("debarking") prior to processing it into product. Rather than disposing of the bark, mills put it to beneficial use by conveying it to plant boilers for energy production. Because mills are permitted for a variety of fuels, when there is no bark, their boilers typically run on oil or natural gas. One reason that bark might not be available is due to plugging that occurs in the bark handling and delivery system.

Plant engineers spend considerable effort to minimize the likelihood of unscheduled breakdowns of the bark handling operations. Feeder system repairs and component

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[14] There are numerous other instances of activities excluded from the definition of NSPS modification that EPA has never considered to require a NSR modification analysis. *See, e.g.*, 40 C.F.R. § 60.560(a)(4)(ii) (for polymer production, addition or replacement of equipment for the purposes of improvement accomplished without an expenditure of funds above a specified threshold is not a modification); *Id.* § 60.590(c) (for equipment leaks at refineries, addition or replacement of equipment for the purpose of process improvement accomplished without a capital expenditure is not a modification); *Id.* § 60.751 (lateral expansion of a municipal solid waste landfill is not a modification unless it results in an increase in the design capacity of the landfill). Under Petitioners' view of NSR, these activities could nonetheless constitute "major" modifications, even though they were not "modifications" in the first place.

replacements are implemented as needed to minimize the likelihood, and the equipment used may vary depending on the bark characteristics of the plant's raw materials. Debugging the feeder system does not affect emission rates at all. It merely allows the system to operate more annual hours within its constructed and permitted capacity, and is entirely consistent with its prior emitting capability. Such repair and replacement activity has never been considered a "modification," much less a "major modification" potentially subject to NSR.

III. EPA's Application of the Regulations Shows That the Examples Above Are Not and Never Have Been "Modifications" or "Major Modifications."

The examples in the prior section are instructive regarding how EPA has interpreted its regulations in practice and its view of the statutory definition of modification. EPA has defined modification in the NSPS program as follows: "any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere [excluding increases in hours of operation] of any pollutant to which a standard applies shall be considered a modification within the meaning of section 111 of the Act." 40 C.F.R. § 60.14(a) (1977). Congress, in turn, defined modification for purposes of NSR by reference to its meaning and use under Section 111. 42 U.S.C. § 7479(2)(C).

EPA further provided when it promulgated regulations to implement the NSR program that permitting requirements would only apply to those "modifications" that are also "major modifications," 40 C.F.R. §§ 52.21(i), 51.166(i). A "major modification" is a modification that increases plantwide annual emissions above "significance" levels. Petitioners urged the Court of Appeals to simply read the word "modification" out of the EPA definition and assume that any activity that increases annual emissions above significance levels is a "major modification" regardless of

whether it is also a "modification." The Court of Appeals declined that invitation, and this Court should too.

Indeed, under Petitioners' theory, the increased production, the grain loading equipment alterations and a host of similar activities that are needed to maintain the nation's productive capacity as constructed and permitted to operate—activity that has never been considered a "modification"—could trigger "major modification" NSR analysis. Triggering the NSR permit process for activities defined not to be "modifications" by EPA or that occur every year at industrial facilities across the country to maintain and improve reliability of existing permitted equipment would subject companies to serial NSR reviews.

The experience of the Associations' members is that obtaining an NSR permit typically takes well over a year, with 3 to 6 months devoted to application preparation and 6 to 12 months or more required for agency processing. Moreover, because no actual construction can occur until the permit is issued, the activities in the examples above would need to await issuance of the permit, bringing the introduction of new versions of products to a virtual standstill. If Congress had established a definition of "modification" with such potentially far-reaching implications, it surely would have said something indicating as much. Instead, it said that for NSR purposes, "modification" would have the meaning and use it has under the NSPS program.

IV. EPA's Claimed Need for Discretion to Address the NSR and NSPS Program Purposes Cannot Undo Plain Statutory Language and Ignores the Requirements Congress Established to Address Them.

The government argues that to effectuate the different purposes of NSR, it needs discretion to interpret the term "modification" differently for the NSPS and NSR programs. United States Br. in Support of Pet'rs ("United States Br.")

at 48-50. This assertion is without merit. The argument ignores that Congress outlined which elements of NSR should be based on NSPS and which should differ to take into account the purposes of the NSR program. Congress chose to use identical definitions of "modification," but it required more stringent control technology requirements for NSR than NSPS, a case-by-case permitting procedure for NSR as compared with the national standards for NSPS, and a detailed air quality analysis for NSR which does not apply under the NSPS program.

EPA and Petitioners fail to explain why the differences Congress set forth do not adequately take into account the differing purposes of the NSR and NSPS programs, or why such purposes would allow EPA to ignore not just an identical definition of modification for the programs, but the adoption of the "meaning" and "use" of the NSPS "modification" definition by reference into the NSR program.

EPA's litigation position is that much more untenable because it goes well beyond what is needed to address any differences in the purposes of the NSPS and NSR programs. EPA's interpretation offered in this litigation would require NSR even where the emissions associated increased operating hours following repaired or replaced equipment are within the emission levels allowed by a plant's construction and operating permits, emissions that *have already been reviewed for their impact on local air quality.* For example, a plant operating under a permit obtained in a previous NSR review already contains "emission limitations . . . which conform to the requirements of [the Act]," and any additional reviews would be redundant. 42 U.S.C. § 7475(a)(1).

The fact that the plant is currently operating with a "compliance margin" or "cushion" between its actual emissions and its permitted emissions—as most plants do—is not a reason for a second review of an emission level that has already been reviewed at least once. Such a rule can

only punish companies that operate their control equipment at maximum capability, in that their efforts to keep their plants well below permitted levels would only serve to impair their ability to make future productivity improvements without further duplicative NSR review. Such a result has no conceivable relation to the differences between NSR and NSPS, or to the goals of the CAA.

EPA has also taken into account local air quality impacts by creating a regulatory definition of "major modification" that looks at annual emissions source-wide. That EPA has discretion to assess the overall impact of the source in netting does not mean, however, that it can change the definition of "modification" any way it likes.

For all of these reasons, the lower courts were correct in concluding that under EPA's established rules, there must be a "modification" of a facility before there can be a "major modification" at a stationary source.

V. Petitioners Misconstrue General Motors' Brief in Prior Litigation on the 1980 Rules; Moreover, Petitioners' Focus on Industry Briefs Instead of EPA Statements Highlights the Lack of Support for Their Reading of the Rules.

The Petitioners argue that the *CMA* litigation (*Chemical Mfrs. Ass'n v. EPA*, No. 79-1112, *et al.* (D.C. Cir.)) shows that, as of the time of promulgation of the 1980 rules, "regulated parties understood that EPA had adopted a new, PSD-specific approach to determining modifications." Pet'rs Br. at 24. Specifically, Petitioners contend, certain parties in the *CMA* litigation, including "General Motors and other major industrial firms," had "attacked EPA's use of an 'actual emissions' test in place of the capacity-based test used in the 1978 PSD regulations and the 1979 proposal." *Id.* at 12.

General Motors Corporation ("GM") is a member of the Alliance of Automobile Manufacturers, participating as

amicus curiae in the preparation of this brief. Contrary to Petitioners' claims, GM has *never* stated *nor understood* the 1980 rules to adopt a different standard for judging whether a "modification" has occurred than the NSPS definition of "modification" Congress enacted for the NSR program. GM's challenge to the 1980 rules was directed at the second step of the analysis that EPA created in those rules in response to the *Alabama Power* remand—the determination of whether a modification is "major" and the corresponding annual accounting of emissions on a source-wide basis.

Quoting from the brief filed in 1981 by GM and other industry petitioners, the Petitioners observe that GM "raised as its first issue" in that case "whether EPA exceeded its 'statutory authority' by providing 'that a modification subject to review under Parts C and D of the Clean Air Act would occur whenever actual emissions from a [major stationary] *source* increased as a result of an alteration to that source, even where the *source's* capacity to emit remains constant." Pet'rs Br. at 12. (quoting Br. of Industry Pet'rs on Actual Emissions Definition of Net Increase at 1, *CMA,* No. 79-1112, *et al.* (D.C. Cir. Feb. 12, 1981) ("1981 GM Brief")) (emphasis added). According to Petitioners, this shows that GM and other petitioners in *CMA* recognized that "EPA had adopted [in the 1980 rules] a new modification standard specially tailored to the PSD provisions," insofar as the *CMA* petitioners "complained vociferously that under the new regulations PSD would apply to projects that 'result in a significant increase in *actual* emissions [of the source], even though the source's net *capacity* to emit remains constant or declines.'" *Id.* at 32 (quoting 1981 GM Brief at 5-6) (*italics* in original) (underline added).[15]

Petitioners misconstrue the challenge GM sought to

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[15] The United States has a similar take on the *CMA* litigation, arguing that "EPA's actual annual emissions test, including its consideration of hours of operation, was subjected to industry challenge as early as 1981." United States Br. at 32-33.

mount in the *CMA* litigation, have distorted the arguments raised by GM in its 25 year-old brief that argued the original PSD rulemaking was inconsistent with the CAA, and selectively quote the content of the settlement agreement in a way that changes its meaning. That GM challenge did not involve the same issues presented in this case. When read in its entirety, the 1981 GM Brief confirms that the portion of the PSD rule at issue was EPA's improper interpretation of the CAA in promulgating the "significant net emissions increase" definition. The GM petition and brief did not engage the issue before this Court, *i.e.*, whether Congress authorized EPA to deviate from the NSPS definition of "modification" as the construction trigger for a "major modification" analysis of projects at existing emission units. Thus, the settlement documents focus on the definition of "major modification." Petitioners' statement that the settlement agreement required EPA to propose that "*modification*" be defined with respect to potential emissions, *id.*, is not true. The settlement agreement required EPA to propose that "*major* modification" be defined with respect to potential emissions.[16]

In *CMA*, GM challenged EPA's promulgation of

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[16] Conveniently dropping the word "major" from the settlement language, Petitioners claim that the settlement required EPA to propose a new (b)(2)(v) "providing that a *modification* 'shall not be deemed to occur if one of the following occurs: (a) there is no significant *net* increase in the *source's* potential to emit (as calculated in terms of pounds of pollutant emitted per hour) or (b) there is no significant *net* increase in the *source's* actual [annual] emissions.'" Pet. Br. at 13 (emphasis in original removed) (emphasis added) (quoting 61 Fed Reg. 38,250, 38,269 (July 23, 1996)). The actual language of the settlement, however, explicitly provided that EPA will propose a revision providing that "[a] *major modification* shall be deemed not to occur if ..." Settlement Agreement, Ex. B, ¶A.1, No. 79-1112 (D.C. Cir. Feb. 22, 1982) ("*CMA* Settlement") (emphasis added). Moreover, as the emphasized terms "net" and "source" demonstrate, it is clear that the settlement addressed the netting rules, not what activity constitutes a modification in the first place.

"netting" rules that were based on net increases in a major stationary source's overall "actual" emissions, instead of net increases in the source's overall "potential to emit" (as EPA had originally proposed in 1979). At no point in its brief did GM indicate any understanding that the 1980 rules provided that projects or activities at a major stationary source that were not NSPS "modifications" would nonetheless be considered "major modifications" under NSR. To the contrary, as explained in more detail below, GM's brief is clear on its face that the only type of "change" or "alteration" to a major stationary source that the industrial petitioners then contemplated would ever constitute a "major modification" under the 1980 rules was the addition of an entirely *new* emissions unit (either as a replacement for an existing unit at the source or as additional capacity). *See, e.g.*, 1981 GM Brief at 6-11.

Contrary to Petitioners' mischaracterizations, the 1981 GM Brief addressed only that portion of the PSD rules that based source-wide "netting" on "actual emissions" rather than "potential to emit." In its brief, GM focused its argument on the illogical netting[17] result under EPA's 1980 rulemaking. The brief explained that replacement of an existing unit with a new unit of identical size and capacity would be deemed a "major modification," and subject to NSR, unless emissions from other units at the source were at the same time reduced. A new emissions unit was presumed under the 1980 rules to emit at its annual "potential to emit"

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[17] Netting refers to a process by which new emissions—*i.e.*, those from a new unit or modification of an existing unit—are internally offset within the plant based on all increases and decreases over a 5-year period. 40 C.F.R. § 52.21. If a source uses netting to internally offset new emissions, there has not been a "major modification," and NSR does not apply. In GM's view, EPA's rules required an apples to oranges comparison, in that the netting calculus was based on the potential emissions from new units for increases and on actual emissions from existing units in determining how much of a decrease in emissions had occurred. *See* 1981 GM Brief at 8-11.

(*i.e.*, assuming annual operation at 8,760 hours even though, as a practical matter, no unit would, or could, reach that level). At the same time, for "netting" purposes under the 1980 rules the emissions from the existing unit that was being replaced were determined on the basis of that unit's "actual emissions" (*i.e.*, a level that would in all cases be less, and likely considerably less, than the new unit's annual "potential to emit").

It is this situation to which GM was referring when it characterized the 1980 rules as providing that a "major modification" would occur "whenever a series of contemporaneous changes at a [major stationary] source result in a significant increase in *actual* emissions, even though the source's net *capacity* to emit remains constant or declines." 1981 GM Brief at 5-6 (emphasis in original). GM was *not* saying that, by shifting to an "'actual emissions' test in place of the capacity-based test used in the 1978 PSD regulations and the 1979 proposal," *see* Pet'rs Br. at 12, EPA had adopted rules under which an activity or project that did not constitute a "modification" of an existing *emissions unit* (because it did not increase the unit's "capacity") could nevertheless constitute a "major modification" of a source. Put simply, the Petitioners' entire argument with respect to the *CMA* litigation founders on their failure to appreciate the distinction between the "capacity" of a major stationary *source* (*i.e.*, the source's "potential to emit") and the "capacity" of an individual emissions *unit*.

Whether GM's view of the CAA would have been sustained by the courts if it had been pursued fully in 1981 instead of settled is not relevant here. There is simply no intersection between GM's position advocated in a past lawsuit and the current case. The prior case involved the netting requirements addressed by the 1980 rules.[18] This

[18] The settlement agreement in *CMA* required EPA to propose that netting would be based on a comparison of potential emissions from new units and potential emissions from existing units in summing increases

case involves the threshold question that precedes netting—whether there has been a modification of an existing emission unit in the first instance.

GM certainly would have raised an additional objection to the rules if it had believed that they provided a modification definition different from the NSPS definition as Congress established. That GM only raised examples involving new units that would be required to utilize the source-wide netting process to determine if a "major modification" had occurred clearly indicates that GM did not address the NSR interpretation first advanced by Petitioners some 20 years after GM filed its brief. Indeed, the very fact that neither GM, nor any other industry party, raised such a challenge to the 1980 rules at that time proves the point: no one within industry had any notion at that time that EPA had promulgated rules with that effect, or that EPA was so interpreting the 1980 rules. This is not the least bit surprising. EPA shared that view as evidenced in formal applicability determinations issued by its chief of enforcement in consultation with its Office of Air Quality Planning and Standards and Office of General Counsel. *See* JA 35-37; JA 27-28.

The Petitioners' determination to rely so heavily on an industry brief, which in fact does nothing to support the Petitioners' position, is instructive. If Petitioners could produce statements *by EPA* at the time the 1980 rules were issued, they surely would offer those in this case. Because EPA's contemporaneous records do not support the revisionist interpretation of the 1980 rules, Petitioners instead have resorted to misstating industry positions through selective quotation of 25-year old briefs and settlement agreements. That they need to misconstrue a brief filed *by industry* to support their position indicates how weak their theory truly is.

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and decreases over a 5-year period. *CMA* Settlement, Ex. B.

VI. Claims of *Amici* STAPPA/ALAPCO Are Baseless.

A. STAPPA/ALAPCO's claim that the lower court ruling will adversely affect air quality is incorrect.

Amici STAPPA/ALAPCO's brief contends that if the lower court is upheld, "virtually all renovations on existing industrial sources of air pollution will be exempted from installing modern pollution controls." STAPPA/ALAPCO Br. at 4-5. Nothing could be further from the truth.

Member companies of the Associations filing this brief have been subject to numerous NSPS requirements since that program was established based on application of the modification provisions of those rules. Moreover, many NSPS have been revised over time to reflect advances in technology. Virtually every automobile paint shop in the United States is subject to the NSPS for automobile and light duty truck coating which limits emissions of volatile organic compounds from these operations. 40 C.F.R. part 60, subpart MM. Similarly, numerous paper mills have become subject to 40 C.F.R. part 60, subpart BB; corn refiners have become subject to the standards for grain elevators in subpart DD; and numerous refineries are subject to the control requirements of subparts GGG and QQQ.[19] The STAPPA/ALAPCO brief attempts to paint an EPA memorandum regarding applicability of NSPS to utility emission units as a broad statement that industry has never become subject to NSPS requirements. Numerous additional examples of NSPS that apply to units as a result of modification exist (*e.g.*, gas turbines, industrial boilers, glass manufacturing furnaces). STAPPA/ALAPCO is well aware of the broad applicability of these requirements because its members administer the NSPS program in many states.

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[19] The memorandum cited in support of *amici's* contention that emission units have not become subject to NSPS modification provisions referred specifically to electric generating units and was in the context of proposed electric utility NSPS revisions. STAPPA/ALAPCO Br. at 5.

Even if STAPPA/ALAPCO could legitimately claim that the lower court's interpretation would lead to all renovations avoiding NSR, which it cannot, STAPPA/ALAPCO members remain fully capable of regulating (and indeed are required to regulate) existing sources through their SIP rules as necessary to attain and maintain NAAQS, and to protect the PSD increments. The member state and local agencies of STAPPA/ALAPCO possess the regulatory authority to require the controls they claim are needed under their SIPs right now, without waiting for a source to make a modification. As explained earlier, Section 110 mandates that states include sufficient measures in their SIPs to attain and maintain applicable NAAQS. 42 U.S.C. § 7410. States regulate existing sources of emissions under SIPs all the time.

For example, numerous SIP rules limit the amount of particulate emissions per unit of product output from all existing sources (so-called process weight rate rules). Similarly, many SIPs impose limits on the NOx or SO_2 emissions per unit of energy generated or on the pounds of VOC that may be contained in a coating product (*e.g.*, for appliances or automobiles). Also, states are required to "review the adequacy of a [PSD] plan on a periodic basis and within 60 days of such time as information becomes available that an applicable increment is being violated." 40 C.F.R. § 51.166(a)(4). If the increments are violated, the state is required to remedy any increment violation. *Id.* § 51.166(a)(3).

B. STAPPA/ALAPCO's claim that state and local agencies cannot meet their CAA obligations without reductions from existing electric generating units is beside the point.

STAPPA/ALAPCO devotes an entire section of its brief to arguing that reductions from electric generating units are needed to meet SIP obligations to attain the NAAQS. STAPPA/ALAPCO Br. at 7-12. This discussion is entirely

inapposite. It has nothing to do with the proper interpretation of the term "modification" under the CAA or EPA's NSR regulations. If emission reductions from one or another source category are needed for an area to achieve a NAAQS, Section 110 requires the *state to regulate that category or find other reductions to meet the NAAQS.* Section 110 does *not* require that EPA expand the scope of NSR to relieve the state from its obligation to issue appropriate regulations to meet the NAAQS. Congress vested states with the decision-making authority for how NAAQS would be achieved. The STAPPA/ALAPCO brief disavows that approach and seeks to foist the technical and political decisions that Congress asked states to make (and that states fought vigorously to keep, *see, e.g., Train v. NRDC*, 421 U.S. 60 (1975)) back to EPA under the guise of the NSR program.[20]

STAPPA/ALAPCO's claim that state law prevents their members from meeting the NAAQS is a red herring. STAPPA/ALAPCO Br. at 12. They claim that half the state agencies are subject to state laws or policies prohibiting them from adopting any regulation more stringent than the "minimum federal law." The "minimum federal law" is Section 110, which requires those states to adopt regulations as needed to attain the NAAQS. A state law that prohibits rules more stringent than federal law has no application in the case where a state agency shows that its rules are needed to meet the requirements of CAA Section 110.

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[20] STAPPA/ALAPCO's brief claims states will face sanctions if NSR is not applied as they suggest. This is untrue. States only face sanctions if they do not submit a SIP containing control measures needed to attain the NAAQS. 42 U.S.C. § 7509(a). Indeed, STAPPA/ALAPCO's approach is backwards: States can revise their SIPs at any time to include the controls needed to attain the NAAQS, and are subject to sanction if they do not do so. *Id.* If NSR *is* applied as STAPPA/ALAPCO's brief suggests, emissions will not necessarily decrease sufficient to meet the NAAQS.

C. STAPPA/ALAPCO's claim that the lower court ruling will limit economic growth is baseless.

The STAPPA/ALAPCO brief states that a "NSR program that effectively exempts renovated units from installing modern pollution control technology will limit economic growth." STAPPA/ALAPCO Br. at 12. In particular, STAPPA/ALAPCO claims that unless Petitioners view of NSR is adopted, the PSD increment will be consumed by increased operating hours of existing units and that this will prevent new units from being installed. There is simply no basis for claiming that subjecting a lower number of existing emissions units to NSR will limit economic growth. Indeed, just the opposite is true. Stifling business' ability to operate their plants—both existing and new (the latter become "existing" once they are built and have started operating)—optimally will hinder economic growth.

The preamble to the 1980 rules in fact recognizes and addresses the specific issue raised by STAPPA/ALAPCO. First, while noting that increments must be protected separately from any preconstruction requirements, EPA explained that states must periodically review air quality and take "corrective action" if the increments are exceeded by *any* activity, including activity at existing sources that consumes increment but is not a major modification subject to NSR permitting.[21] 45 Fed. Reg. 52,676, 52,677 (Aug. 7, 1980). *See also* 40 C.F.R. §§ 51.166(a)(3)-(4). Second, EPA explained that states could "revise SIPs and/or issue operating permits so that SIP requirements and permits reflect actual source operating conditions," if needed to protect the increments. 45 Fed. Reg. at 52,721-22. Thus,

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[21] This is one of the PSD program elements that Congress specifically "tightened" in the 1977 Amendments. *See Alabama Power v. Costle*, 636 F.2d 323, 350 (D.C. Cir. 1979). The 1974 rules neither required nor authorized state action to protect increments if exceeded as a result of activity that was not a modification, *e.g.*, raw material changes.

states have both the mandate and tools to protect increments quite apart from preconstruction review, and there is no basis for claiming that an overly broad reading of the "modification" rules is essential for increment protection. The "modification" definition is applicable to "renovated" units whenever they exceed their past actual emissions capability; if a source has been restricted in its emissions or operating hours to protect increment, any exceedance of those levels would be subject to PSD review. Thus, it is simply untrue that renovated units can never be considered to have been modified.

In the PSD program, Congress struck a delicate balance "to insure that economic growth will occur in a manner that is consistent with the preservation of existing clean air resources." 42 U.S.C. § 7470(3). Industrial operations fluctuate constantly, on an hourly, daily, monthly and yearly basis. The origins of these fluctuations are varied and include the overall state of economic growth in the country and the world economy, discovery of new uses for existing products, consumer preferences, competition, the availability of raw materials or other facilities, and more.

Companies seek and are issued permits to allow them to operate in dynamic markets and to increase their operating hours while maintaining their facilities. As EPA has consistently recognized, Congress did not intend to regulate fluctuations in operation. Rather, it is the litigating position of Petitioners and EPA and advanced by STAPPA/ALAPCO in its brief that would restrict economic growth by frustrating the intended operation of American manufacturing facilities that have already been reviewed for their emissions impact.

CONCLUSION

The judgment of the Court of Appeals should be upheld.

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IN THE

Supreme Court of the United States

ENVIRONMENTAL DEFENSE, *et al.*,
Petitioners,

v.

DUKE ENERGY CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE FOR THE NATIONAL ENVIRONMENTAL DEVELOPMENT ASSOCIATION'S CLEAN AIR PROJECT IN SUPPORT OF RESPONDENTS DUKE ENERGY CORPORATION, ET AL.

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OTHER AUTHORITIES:

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IN THE

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No. 05-848

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BRIEF AMICUS CURIAE FOR THE NATIONAL ENVIRONMENTAL DEVELOPMENT ASSOCIATION'S CLEAN AIR PROJECT IN SUPPORT OF RESPONDENTS DUKE ENERGY CORPORATION, ET AL.

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae the National Environmental Development Association's Clean Air Project ("NEDA/CAP") is a coalition of manufacturers representing major industrial sectors, including the aerospace, aluminum, automobile manufacturing, natural resource exploration, refining and petrochemicals, pharmaceuticals, electronics, and home products

industries.[1] NEDA/CAP was formed in 1979, shortly after the enactment of the 1977 Clean Air Act Amendments, to address major policy issues arising under the Clean Air Act ("CAA"), its regulations, and Environmental Protection Agency ("EPA") guidance. NEDA/CAP's members own and operate "major emitting facilities" and "major stationary sources" under the CAA, and thus are subject to the extensive review and permitting requirements of the CAA's New Source Review ("NSR") program when they make changes at their plants that trigger NSR review.

Although this case involves an electric utility, the issue in this case—whether a "modification" for NSR purposes requires an increase in maximum achievable hourly emissions—affects a broad spectrum of manufacturing industries, both large and small. In contrast to electric utilities that use a single configuration of equipment to generate electricity, manufacturers typically use multiple process lines—consisting of dozens or even hundreds of pieces of equipment with numerous emissions points—to manufacture various products during different periods of the year depending on economic demand and other factors. While electric utilities often make large-scale repairs to very large pieces of equipment—*i.e.*, coal-fired boilers—to keep them operating as designed, manufacturers often make smaller changes to smaller pieces of equipment in response to breakdowns and other disturbances. If petitioners' and EPA's interpretation of the CAA were upheld, such activities would be repeatedly subject to NSR review. The recent invalidation of an EPA regulation concerning an exclusion for "routine, mainte-

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[1] Pursuant to this Court's Rule 37.6, NEDA/CAP notes that no part of this brief was authored by counsel for any party, and no person or entity other than NEDA/CAP made any monetary contribution to the preparation or submission of the brief. This brief is filed with the written consent of all parties pursuant to Rule 37.3(a). Copies of the requisite consent letters have been filed with the Clerk.

nance, repair, and replacement" elevates the importance of the definition of emissions "increase" at issue here. *See New York* v. *EPA*, 443 F.3d 880 (D.C. Cir. 2006).

More than 35 years ago, EPA interpreted the statutory definition of "modification" for the first time in the context of the New Source Performance Standards ("NSPS") program and interpreted it to mean an increase in maximum achievable hourly emissions. Several years later, EPA defined "major modification" in the NSR context as a significant net increase in actual annual emissions. Congress specifically provided that the term "modification" in the NSR context have the same meaning as the term "modification" in the NSPS context. Thus, NSR review should be triggered only if a change results in a "modification"—requiring an increase in a unit's maximum achievable hourly emissions—and a "major modification"—requiring a significant net increase in source-wide actual annual emissions.

This two-step NSR applicability test ensures that NSR applies only to those projects that merit both the extensive permit application and review process and the installation of costly emission controls. An increase in maximum achievable hourly emissions typically does not occur unless a manufacturer makes a change that *increases* production capacity. A change that increases production capacity—and thus increases maximum achievable hourly emissions—warrants the application of new emissions controls. Not all increases in hourly emissions are significant enough, however, to warrant NSR review and permitting and the installation of state-of-the-art emissions controls. Many increases in maximum achievable hourly emissions at an individual unit will not cause a significant net increase in source-wide actual annual emissions because, for example, demand or production may decrease over the course of a year or because an emissions increase at an individual unit may be offset by an emissions decrease at another unit within a plant. If a project will not only increase maximum achievable hourly emissions

(a "modification") but also cause a significant net increase in actual annual emissions (a "major modification"), then the project may have a significant environmental impact—one that more reasonably justifies NSR review and the installation of more costly emissions controls. Thus, a two-step NSR applicability test closely aligns with one of the central goals of the NSR program—balancing the interest in improving air quality with "the allowance of reasonable economic growth." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 863 (1984).

Petitioners and EPA would have this Court hold that a "modification" is not required to trigger NSR review—*i.e.*, that the Court eliminate the first step of the NSR applicability test. Petitioners' and EPA's interpretation of the CAA—which subjects a source to NSR review even where a change does not increase production capacity—would require sources to undergo NSR review far more frequently than Congress could have ever intended. This Court should affirm the judgment below and hold that "modification" in the NSR context means the same thing as it does in the NSPS context—*i.e.*, a change that increases maximum achievable hourly emissions. At the same time, the Court should make clear that EPA's definition of "major modification"—requiring a significant net increase in source-wide actual annual emissions before NSR review is triggered—is consistent with the CAA. As we explain below, there are key differences between the NSPS and NSR programs—highlighted in a line of significant decisions—that warrant the requirement of a "major modification" as a second step of the NSR applicability test.

STATEMENT OF THE CASE

The NSPS Program. In 1970, Congress enacted the NSPS program, which directed EPA to prescribe national technology-based performance standards for various categories of equipment—*e.g.*, fossil fuel-fired steam generators. *See* 42

U.S.C. § 7411; 40 C.F.R. § 60.40. The NSPS program applies only to "new sources"—*i.e.*, any "stationary source," the "construction" or "modification" of which is commenced after the publication of regulations prescribing a performance standard applicable to such source. 42 U.S.C. § 7411(a)(2). "Modification" is defined as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." *Id.* § 7411(a)(4).

In 1975, EPA promulgated regulations that for the first time "clarif[ied] the phrase * * * 'increases the amount of any air pollutant,' " in the statutory definition of "modification." 39 Fed. Reg. 36,946, 36,946 (Oct. 15, 1974). The 1975 rules provided that, with certain exceptions, "any physical or operational change to an existing facility which results in an increase *in the emission rate to the atmosphere* of any pollutant to which a standard applies shall be a modification." 40 Fed. Reg. 58,416, 58,419 (Dec. 16, 1975) (40 C.F.R. § 60.14(a), (e)(3)) (emphasis added). To further "clarif[y] what constitutes an increase in emissions," 39 Fed. Reg. at 36,947, the 1975 rules provided that the "[e]mission rate shall be expressed as kg/hr of any pollutant discharged into the atmosphere." 40 Fed. Reg. at 58,419 (40 C.F.R. § 60.14(b)). As EPA explained, the unit "kg/hr" has "the advantages of being sensitive to increased production capacity and to the overall increase in total emissions to the atmosphere," while "*automatically* allow[ing] increases in operating hours as intended by one of the existing exemptions." 39 Fed. Reg. at 36,947 (emphasis added).

The 1975 rules also provided that "[a] modification shall not be deemed to occur if an existing facility undergoes a physical or operational change where * * * the total emission rate of any pollutant has not increased from all facilities within the stationary source." 40 Fed. Reg. at 58,419. That application of the "bubble concept"—which treats an entire

plant as a single "source" and allows emissions increases from units within the plant to be offset by emissions decreases from other units within the plant—was invalidated by the D.C. Circuit in *ASARCO Inc.* v. *EPA*, 578 F.2d 319 (D.C. Cir. 1978). The NSPS provisions define "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant." 42 U.S.C. § 7411(a)(3). In the 1975 rules, however, EPA defined "stationary source" to include a "combination" of facilities. *See* 40 Fed. Reg. at 58,418. By so defining "stationary source," the rules "allow[ed] a facility whose emissions are increased by alterations to avoid complying with the applicable NSPS as long as emissions decreases from other facilities within the same 'source' cancel out the increase from the altered facility." 578 F.2d at 326. The D.C. Circuit concluded, however, that EPA "ha[d] no authority to rewrite the statute in this fashion." *Id.* at 327.

The NSR Program. In 1977, Congress enacted the New Source Review ("NSR") program. The NSR program has two components: the Prevention of Significant Deterioration ("PSD") program, *see* 42 U.S.C §§ 7470 *et seq.*, and the Nonattainment New Source Review ("NNSR") program, *see id.* §§ 7501 *et seq.* The PSD program applies in "attainment areas"—*i.e.*, those areas meeting the NAAQS for particular pollutants, *id.* § 7471; the NNSR program applies in "nonattainment areas"—*i.e.*, those areas that have not yet met the NAAQS for particular pollutants, *id.* § 7501(2). The PSD program applies to any new or modified "major emitting facility," *id.* § 7479(1); the NNSR program applies to all new or modified "major stationary sources," *id.* § 7502(c)(5). "Major stationary source" and "major emitting facility" are defined as "any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year of any air pollutant." *Id.* § 7602(j).[2] The

[2] The term "major emitting facility" is separately defined in the Act to include a number of specifically identified "stationary

NNSR provisions define "modification" to "mean the same as the term 'modification' *as used* in section 7411(a)(4)"—*i.e.*, the NSPS definition of "modification." *Id.* § 7501(4) (emphasis added). The PSD provisions define "construction" to "include[] * * * modification * * * (*as defined* in section 7411(a)." *Id.* § 7479(2)(C) (emphasis added).

Both the PSD and NNSR programs require affected sources to undergo an extensive preconstruction review process and to obtain a preconstruction permit, which may not be issued "unless several stringent conditions are met." *Chevron*, 467 U.S. at 840. *See* 42 U.S.C. §§ 7475, 7503; *infra* at 15-16. The PSD program requires affected sources to apply emissions controls determined to be the "best available control technology" ("BACT"). 42 U.S.C. §§ 7475(a)(4), 7479(3). The NNSR program requires affected sources to apply emissions controls determined to achieve the "lowest achievable emissions rate ("LAER"). *Id.* § 7501(3), 7503(a)(2). The NNSR program also requires that *any* emissions increase at a source be offset by a corresponding decrease at the same source or another source in the same non-attainment area. *See id.* § 7503(c).

In 1978, EPA promulgated rules implementing the PSD program. The 1978 rules defined "*major* modification" as "any physical change [or] change in the method of operation of * * * a stationary source which increases the *potential emission rate* of any air pollutant regulated under the Act * * * by either 100 tons per year or more for [certain] source[s] * * * or by 250 tons per year or more for any stationary source." 43 Fed. Reg. 26,380, 26,382 (June 19, 1978) (emphases added). In *Alabama Power Co.* v. *Costle*, 636 F.2d 323 (D.C. Cir. 1979), the D.C. Circuit held that, while there was no statutory basis for EPA's 100- and 250-ton thresholds for PSD applicability, "EPA *does* have discre-

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sources of air pollutants," such as "kraft pulp mills" and "iron and steel mill plants." 42 U.S.C. § 7479(1).

tion, in administering the statute's 'modification' provision, to exempt from PSD review some emission increases on grounds of *de minimis* or administrative necessity." *Id.* at 400 (emphasis added). As the court recognized, "the application of BACT requirements to the emission of all pollutants from a new facility, *no matter how miniscule some may be*, could *impose severe administrative burdens on EPA, as well as severe economic burdens on the construction of new facilities*." *Id.* at 405 (emphases added).

The *Alabama Power* court also endorsed the application of the "bubble concept" in the PSD context. As the court recognized, "alterations of almost any plant occur continuously; whether to replace depreciated capital goods, to keep pace with technological advances, or to respond to changing consumer demand." *Id.* at 401. Congress, however, intended to subject sources to PSD review "only where industrial changes might increase pollution in an area, not where an existing plant changed its operations in ways that produced no pollution increase." *Id.* Thus, the court concluded, an "interpretation of 'modification' as requiring a *net* increase is * * * consistent with the purposes of the Act." *Id.* (emphasis added).

In so holding, the court distinguished its decision in *ASARCO*, relying on differences in statutory language in the NSPS and PSD provisions. In the NSPS context, the court explained, EPA had no authority to expand the definition of "source" to include an entire plant where "[t]hat definition * * * was not expanded by any other part of the NSPS provisions." *Id.* at 397. "With regard to PSD, however, Congress clearly envisioned that entire plants could be considered to be single 'sources.' " *Id.* As the court explained, the CAA expressly defines "major emitting facility" to include "many types of plants as stationary sources." *Id.* at 396. Thus, the court concluded, "EPA has latitude to adopt definitions of the component terms of 'source' that are different *in scope* from those that may be employed for

NSPS * * *, due to differences in the purpose and structure of the two programs." *Id.* at 397-398 (emphasis added).

In 1980, EPA issued new PSD regulations in response to *Alabama Power*. *See* 45 Fed. Reg. 52,676 (Aug. 7, 1980). The 1980 rules defined "major modification" as "any physical change in or change in the method of operation of a stationary source that would result in a *significant net* emissions increase of any pollutant subject to regulation under the Act." *Id.* at 52,730 (40 C.F.R. § 51.166(b)(2)(i) (1987)) (emphasis added). The rules also specified that "[a] physical change *or* change in the method of operation shall not include * * * [a]n increase in the hours of operation." *Id.* at 52,736 (40 C.F.R. § 51.166(b)(2)(iii)(f) (1987)) (emphasis added). The 1980 rules set "significance levels" for pollutants by defining "significant" as "a rate of emissions that would equal or exceed" specified amounts of emissions (in tpy) for given pollutants, *id.* at 52,732 (40 C.F.R. § 51.166(b)(23)(i) (1987)), and also established methods of determining source-wide "net" increases (netting rules). *Id.* at 52,730 (§ 51.166(b)(3)(i)-(viii) (1987)).

In 1981, EPA promulgated regulations applying the "bubble concept" in the NNSR context. *See* 46 Fed. Reg. 50,766 (Oct. 14, 1981). In *Chevron*, *supra*, this Court held that EPA's definition of the term "source"—which defined the component terms of the NSPS statutory definition of "source" to include "all of the pollution-emitting devices within the same industrial grouping"—was "a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth." *Id.* at 840, 865. As the Court noted, the legislative history of the CAA "plainly identifies the policy concerns that motivated the enactment [of the NSR program]," and "the plant-wide definition is fully consistent with one of these concerns—*the allowance of reasonable economic growth.*" *Id.* at 863 (emphasis added).

SUMMARY OF ARGUMENT

I. A two-step NSR applicability test—requiring both a "modification" and a "major modification" to trigger NSR review—is consistent with the plain language of the CAA. Because Congress specifically incorporated the NSPS definition of "modification" into the NSR definition of "modification," an NSPS "modification" is required in the first instance to trigger NSR review. EPA's definition of "major modification"—requiring in addition a significant net increase in source-wide actual annual emissions before NSR review is triggered—reflects two key differences between the NSPS and NSR programs. First, the "bubble concept"—which allows plantwide emissions increases to be offset by contemporaneous emissions decreases—applies in the NSR context, but not the NSPS context. Second, the NSR program contains exemptions for *de minimis* increases, without which the NSR program would "impose severe administrative burdens on EPA, as well as severe economic burdens on the construction of new facilities." *Alabama Power*, 636 F.2d. at 405. These two salient features of the definition of "major modification" have been upheld by the courts and "explain why emissions under [NSR] must be calculated on an annual basis" as a second step in determining NSR applicability. Pet. App. 64.

II. A two-step NSR applicability test is also the only reasonable and workable approach to implementing the NSR program. There is no question that NSR review and permitting is burdensome, time-consuming, and expensive. Manufacturers often make repairs and other changes that do not increase production capacity—and thus do not increase maximum achievable hourly emissions—to maintain production capacity, respond to market demand, and ensure the reliability, efficiency, and safety of their equipment. If petitioner's and EPA's theory of NSR applicability were to prevail, repairs and other changes that do not increase production capacity could potentially trigger NSR review, as

EPA measures increases by comparing past historical emissions—*i.e.*, emissions before a repair when the equipment was operating in an impaired condition—to future actual emissions—*i.e.*, emissions after the repair when the equipment may be fully functional and operating as designed.

Frequent—and for the same piece of equipment, repeated—NSR review would have a crippling effect on manufacturers, permitting authorities, and the economy. Because construction of a project that triggers NSR review may not begin until a permit has been issued, manufacturers would have to operate broken equipment in its impaired condition—or worse, not at all—during the lengthy NSR review and permitting process and until construction is completed. If NSR review were required for changes that do not increase production capacity, manufacturing would come to a standstill, critical (and life-saving) products would not reach consumers, and financially-strapped permitting authorities would be overwhelmed.

The first step of the NSR applicability test—requiring an increase in a unit's maximum achievable hourly emissions—is therefore a critical step for manufacturers. But equally vital is the second step of the NSR applicability test—requiring a significant net increase in source-wide actual annual emissions. Not all changes that increase production capacity—and that warrant the application of NSPS emissions controls—have a significant enough impact on ambient air quality to warrant NSR review and the application of costly state-of-the-art emissions controls. As noted in *Alabama Power*, the two salient features of the annual emissions test—significance levels and netting—ensure that the NSR program does not "*impos[e] a completely disabling administrative and regulatory burden.*" 636 F.2d at 400 (emphasis added). A two-step applicability test—requiring NSPS controls for changes that increase production capacity and NSR controls for those changes that also have a significant impact on ambient air quality—is therefore not only

consistent with the CAA, but also the only approach that yields satisfactory economic and administrative results.

ARGUMENT

I. A TWO-STEP NSR APPLICABILITY TEST IS CONSISTENT WITH THE PLAIN LANGUAGE OF THE CAA.

More than 35 years ago, EPA "clarif[ied]" for the first time the term "increase" in the statutory definition of "modification." 39 Fed. Reg. at 36,946. At that time, EPA recognized that many potential "unit[s] of measurement" could be used to "determin[e] whether an increase in emissions has occurred"—*e.g.*, "units of time (day, year), concentration, feed rate into a process, and production rate." *Id.* at 36,947. EPA concluded, however, that "[u]nits of time" have "the advantages of being sensitive to increased production capacity and to the overall increase in total emissions to the atmosphere." *Id.* EPA decided that the most appropriate "unit of time" for "determining whether an increase in emissions has occurred" was the unit "kg/hr," which would "*automatically* allow increases in operating hours as intended by one of the existing exemptions." *Id.* (emphasis added).

There is no reason why an "increase" in emissions should be defined as an increase in a unit's maximum achievable hourly emissions rate for NSPS purposes but not for NSR purposes, particularly where the NSR regulations include the *same* exclusion for "increases in operating hours." *See* 40 C.F.R. § 51.166(b)(2)(iii)(f) (1987). But the application of the NSPS hourly emissions test in the NSR context does not—and should not—preclude the further application of a source-wide annual emissions test. Indeed, EPA *itself* has opined that there must be both an NSPS "modification" and an NSR "major modification" to trigger NSR review. As EPA confirmed shortly after it adopted the 1980 rules, as a threshold matter, "PSD applicability is determined by evaluating any change in the [hourly] emissions rates caused

by" a proposed physical or operational change. *See* J.A. 27-28. Thus, the District Court below concluded that PSD review is triggered *only* if there is 1) an increase in a unit's maximum achievable hourly emissions, and 2) a significant net increase in source-wide actual annual emissions. As the court explained:

> PSD may be triggered if there is an increase in the maximum hourly emissions rate. In this regard, the PSD and NSPS emissions tests are similar. Unlike NSPS which is always triggered whenever there is an increase in the hourly rate of emissions, PSD is potentially triggered when there is an increase in the hourly emissions rate but only if the annualized emissions increase (1) exceeds the significance levels in 40 C.F.R. § 51.166(b)(23) and (2) is not offset by contemporaneous decreases at the source, *id.* § 51.166(b)(3). [Pet. App. 64a.]

The same result should follow under the Fourth Circuit's approach, which focused solely on the fact that "Congress mandated that the PSD statute incorporate the NSPS statutory definition of 'modification.' " *Id.* at 18a. The Fourth Circuit held that "EPA cannot interpret 'modification' under the PSD *inconsistently* with the way it interprets that term under the NSPS." *Id.* at 11a (emphasis added). Because "NSPS regulations * * * define the term 'modification' so that only a project that increases a plant's *hourly* rate of emissions constitutes a 'modification,' " the Fourth Circuit held that "EPA must * * * interpret its PSD regulations defining 'modification' congruently." *Id.* at 18a. There is nothing "inconsistent" about defining "modification" in both the NSPS and NSR contexts to mean an increase in a unit's maximum achievable hourly emissions and defining "major modification" in the NSR context to mean a significant net increase in source-wide actual annual emissions. Put differently, it is not inconsistent for EPA to use an hourly emissions test in the NSPS context and a two-step hourly and annual emissions test in the NSR context, where the use of

that second step is based on important differences between the two programs.

One significant difference between the NSPS and NSR programs involves the application of the "bubble concept," which allows plantwide emissions increases to be offset by contemporaneous emissions decreases. In *ASARCO*, the D.C. Circuit rejected the application of the bubble concept in the NSPS context. *See* 578 F.2d at 326-327; *supra* at 5-6. In *Alabama Power*, the D.C. Circuit—relying on differences in statutory language in the NSPS and NSR provisions—held that the application of the bubble concept in the PSD context was "mandatory." *NRDC* v. *Gorsuch*, 685 F.2d 718, 726 (D.C. Cir. 1982), *rev'd on other grounds sub nom. Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). *See supra* at 8-9. In *Chevron*, this Court held that EPA had reasonably exercised its discretion to employ the bubble concept in the NNSR context. *See* 467 U.S. at 865; *supra* at 9.

Another key difference between the NSPS and NSR programs involves the exemption of *de minimis* increases. In *Alabama Power*, the D.C. Circuit recognized that subjecting *all* increases to PSD review, "no matter how miniscule some may be," could "*impose severe administrative burdens on EPA, as well as severe economic burdens on the construction of new facilities*." 636 F.2d. at 405 (emphasis added). Thus, the court held, "EPA *does* have discretion, in administering the statute's 'modification' provision, to exempt from PSD review some emission increases on grounds of *de minimis* or administrative necessity." *Id.* at 400 (emphasis added). Those exemptions are reflected in the "significance levels" that EPA has established for various pollutants. *See* 40 C.F.R. § 51.166(b)(23)(i); *supra* at 9.

As the District Court below explained, the "two conditions for PSD applicability—significance levels and netting"—"explain why emissions under PSD must be calculated on an annual basis." Pet. App. 64. "[M]easuring emissions in tons

per year makes possible netting (addition and subtraction) of emissions rates between various units at a plant." *Id.* An annual emissions test also "makes possible" the exemptions for *de minimis* increases, which must be measured in tons per year since "major" stationary sources are defined as sources that emit "one hundred *tons per year* or more of any air pollutant." 42 U.S.C. § 7602(j) (emphasis added).

EPA's definition of "major modification" in the NSR context reflects these differences between the NSPS and NSR programs. Thus, in the NSR context, EPA may require both a "modification" *and* a "major modification" to trigger NSR review. What EPA emphatically *cannot* do is require NSR review for a change that is not "modification."

II. A TWO-STEP NSR APPLICABILITY TEST IS THE ONLY REASONABLE AND WORKABLE APPROACH TO IMPLEMENTING THE NSR PROGRAM.

A two-step NSR applicability test is not only consistent with the plain language of the CAA, but the only reasonable and workable approach to implementing the NSR program. Without the two-step test, manufacturers would be subject to frequent—and for the same piece of equipment, repeated—NSR review and permitting. That outcome would have a crippling effect on industry, permitting authorities, and the economy.

A. NSR Review And Permitting Is Burdensome, Time-Consuming, And Expensive.

There is no question that the NSR program imposes substantial burdens on industry. If a proposed change triggers NSR review, an operator must comply with numerous "stringent" requirements. *Chevron*, 467 U.S. at 840. *See* 42 U.S.C. §§ 7475, 7503. Among other things, extensive computer modeling is required to determine the proposed project's impact on ambient air quality, PSD increments, and

NNSR growth margins. *See id.* §§ 7475(a)(3), (6), (b), 7503(a)(1). If a Class I national park or wilderness area in a PSD area may be affected, an analysis of the project's effect on visibility and environmentally sensitive biota, such as milkweed, clover, and poison ivy, is also required. *See id.* § 7475(d)(2)(b); Federal Land Managers' Air Quality Related Values Workgroup Phase I Report 84-102 (Dec. 2000). The technical feasibility and the costs of applying state-of-the-art emissions controls—*i.e.*, BACT or LAER—must also be evaluated. *See* 42 U.S.C. §§ 7475(a)(4), 7479(3), 7501(3), 7503(a)(2). If NNSR review has been triggered, an emissions offset must be obtained at the same source or another source within the same non-attainment area. *See id.* § 7503(c).

NSR review is also very time-consuming. EPA recently reported that the entire NSR permitting process can take between 7 and 22 months. *See* EPA, *New Source Review: Report to the President* 20 (2002); *see also Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 515 (2004) (18-month PSD permitting process) (Kennedy, J., dissenting). In the experience of NEDA/CAP's members, the permitting process for a complex project can actually take much longer—sometimes between five and seven years. *See Alaska*, 540 U.S. at 516-517 (noting experience of NEDA/CAP's members) (Kennedy, J., dissenting). That is due in no small part to the substantial burden that NSR places on, not only industry, but permitting authorities. *See Alabama Power*, 636 F.2d at 400, 405 (recognizing administrative burden imposed by PSD). Permitting authorities must devote a substantial amount of time to reviewing and analyzing permit applications and supporting documentation. Once a permit application has been approved, it must be subjected to public notice and comment; agencies must respond to such comments and provide a hearing, if requested. *See* 40 C.F.R. Part 124; § 51.166(q).

And it cannot be disputed that NSR review is expensive. *See, e.g., Alabama Power*, 636 F.2d at 353 (noting the "*substantial regulatory costs* imposed by" the PSD program) (emphasis added). The costs of preparing a permit application alone can be substantial. Last year, one of NEDA/CAP's members spent $300,000—exclusive of legal costs—to prepare a permit application to make a change at an Ohio auto plant. In 2004, another NEDA/CAP member spent more than $1 million to prepare a permit application to install two paper machines and a gas-fired boiler at a Missouri paper and diaper plant. Neither of those applications was publicly-contested, which can occur and multiply exponentially the costs of obtaining a permit.

But the costs of preparing a permit application pale in comparison to the capital expenditures required to retrofit equipment with BACT or LAER, which can run into the millions of dollars. In 2002, a NEDA/CAP member was required to comply with BACT at an existing source by installing a $6 million carbon absorber to reduce VOC emissions. In 2001, another NEDA/CAP member would have had to spend between $75-$100 million to equip a 400 megawatt coal-fired industrial boiler with BACT to reduce SO2, NOx, and CO emissions. Because of the staggering cost of BACT, the project was abandoned.

B. If Petitioner's And EPA's Theory Of NSR Applicability Were To Prevail, Manufacturers Would Be Subject To Frequent And Repeated NSR Review And Permitting.

If the first step of the NSR applicability test were eliminated—*i.e.*, if changes that do not constitute a "modification" because they do not increase production capacity potentially triggered NSR review—manufacturers would be subject to frequent and repeated NSR review. Manufacturers often make changes that do not increase production capacity—and thus do not increase maximum achievable hourly emissions.

For example, manufacturers continually repair equipment due to breakdowns, wear and tear, and damage. Such repairs allow manufacturers to maintain production capacity, respond to market demand, and ensure the reliability, efficiency, and safety of their equipment. While such changes may allow increased hours of operation—because, for example, the equipment is fully functional and operating as designed—they generally do not increase maximum achievable hourly emissions. If the first step of the NSR applicability test were eliminated, such changes might trigger NSR review, as EPA measures increases by comparing past historical emissions to future actual emissions. *See infra* at 21.

Frequent and repeated NSR review for repairs and other changes that do not increase production capacity would have a crippling effect on industry, permitting authorities, and the economy. The costs of repeatedly complying with the NSR permitting process—not to mention the costs of re-applying BACT or LAER, if new technology emerges—would alone have a devastating impact on industry.

C. Because Construction Of A Project That Triggers NSR Review Cannot Begin Until An NSR Permit Has Been Issued, Manufacturers Would Have To Operate Broken Equipment, If At All, In Its Impaired Condition While Waiting For A Permit To Be Issued.

Even more devastating to industry would be the substantial delays resulting from frequent NSR review. If NSR review is triggered, construction of a project may not begin until a permit has been issued. *See* 40 C.F.R. § 51.166(a)(7)(iii). That means that if broken equipment is being replaced, a manufacturer must operate the equipment in its impaired condition—or worse, not at all—until a permit has been issued and construction completed. Given that dozens if not hundreds of such changes may occur on a single process line

over the course of a year, manufacturing would grind to a halt if NSR permitting were required for changes that do not increase production capacity.[3]

In that regard, not only industry but the entire economy would suffer. What is more, critical products—like life-saving medicines—would not reach consumers. Nor is frequent and repeated NSR permitting desirable from a regulatory perspective. As noted, the NSR program places substantial administrative burdens on EPA and state and local permitting authorities operating with limited resources.[4]

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[3] The 1980 rules exclude from the definition of "physical change or change in the method of operation" certain changes that are "routine maintenance, repair and replacement." *See* 40 C.F.R. § 51.166(b)(2)(iii)(a) (1987); *see also* 40 C.F.R. § 51.166(b)(2)(iii)(a). The scope of that exclusion—a disputed issue in this case below—is a matter of great uncertainty and complexity. EPA has published interpretative guidance that requires consideration of at least 14 criteria to determine whether a change is "routine maintenance, repair, and replacement." *See* 65 Fed. Reg. 77623 (Dec. 12, 2000). EPA has asserted that the exclusion is "very narrow," *United States* v. *Ohio Edison Co.*, 276 F. Supp. 2d 829, 888 (S.D. Ohio 2003), and the D.C. Circuit has suggested that it only applies to changes that cause *de minimis* emissions increases. *See New York* v. *EPA*, 443 F.3d at 890.

[4] Amici Curiae STAPPA & ALAPCO recently testified before Congress concerning proposed budgets cuts to grants to state and local permitting authorities, protesting such cuts "[i]n a time of limited state and local resources, where state and local governments *are straining to maintain existing programs.*" *Interior, Environment, and Related Agencies Appropriations for 2007 Part 7: Hearings Before the Subcomm. on Interior, Environment and Related Agencies of the House Comm. on Appropriations*, Testimony of Members of Congress, Prepared Statements of Outside Witnesses, 109th Cong. 591 (2006) (statement of State and Territorial Air Pollution Program Administrators and the Association of Local Air Pollution Control Officials) (emphasis added).

If NSR permits are to be required for repairs and other changes that do not increase production capacity, permitting authorities will be quickly overwhelmed—thus leading to even longer delays in the permitting process—unless they receive substantial additional funding which likely would have to be diverted from other important governmental programs.

D. A Two-Step NSR Applicability Test Is Necessary For Satisfactory Economic And Administrative Results.

As the foregoing makes clear, the first step of the NSR applicability test—requiring an increase in a unit's maximum achievable hourly emissions—is a critical step for manufacturers. But equally vital is the second step of the NSR applicability test—requiring a significant net increase in source-wide actual annual emissions. While changes that increase production capacity—and thus increase a unit's maximum achievable hourly emissions—warrant the application of NSPS emissions controls, not all such changes have a significant enough impact on ambient air quality to warrant NSR review and the application of state-of-the-art emissions controls. Many increases in a unit's maximum achievable hourly emissions will not cause a significant net increase in source-wide actual annual emissions because, for example, the equipment may be operated for only a short time. Thus, only those changes that not only increase production capacity but also cause a significant net increase in source-wide actual annual emissions warrant NSR review and permitting.

As the D.C. Circuit explained in *Alabama Power*, an exemption for *de minimis* increases and netting—the two salient elements of "major modification"—"allow for improvement of plants, technological changes, and replacement of depreciated capital stock, *without imposing a completely disabling administrative and regulatory burden.*" 636 F.2d at 400 (emphasis added). A two-step applicability test—

requiring NSPS controls for changes that increase production capacity and NSR controls for increases in capacity that also have a significant impact on ambient air quality—is therefore not only consistent with the CAA, but also the only approach that yields satisfactory economic and administrative results.

That two-step test also provides industry with two things of which it is sorely in need: consistency and predictability. EPA's current test for calculating an emissions increase is by no means "longstanding." Pet. Br. i. EPA's departure from its contemporaneous conclusion that the 1980 rules required an increase in maximum achievable hourly emissions to trigger NSR review began with the applicability determination at issue in *Wisconsin Elec. Power Co.* v. *Reilly*, 893 F.2d 901 (7th Cir. 1990) ("*WEPCo*"). *See* J.A. 27-28, 35-37. There, EPA applied an "actual-to-potential" test to a utility's like-kind replacement of aging equipment. 893 F.2d at 916. Since then, EPA has applied various methodologies for comparing emissions before and after a change. In response to the invalidation of the "actual-to-potential" test in *WEPCo*, EPA adopted an optional "actual-to-projected actual" test—but only for existing electric utilities. *See* 57 Fed. Reg. 32,314, 32,314 (July 21, 1992). In 2002, EPA adopted an optional "actual-to-projected actual" test for all existing sources. *See* 67 Fed. Reg. 80,186, 80,196 (Dec. 31, 2003). Presently pending is EPA's 2005 proposal of a new test that, if adopted, "would establish a uniform emissions test nationally under the NSPS and NSR programs"—but, again, only for existing electric utilities. *See* 70 Fed. Reg. 61,081, 61,081 (Oct. 20, 2005).

This case itself highlights EPA's inconsistency: after initially asserting that the applicable test was the "actual-to-potential" test, EPA later abandoned that approach in favor of an "actual-to-projected actual" test. *See* Pet. App. 58a & n.17. In a previous enforcement action against the Tennessee Valley Authority, EPA never even identified the emissions increase test that provided the basis for its enforcement

action, but instead asserted that an emissions increase resulted under any of "several different methods" of calculating an emissions increase. *See In re Tennessee Valley Authority*, 9 E.A.D. 357, 439-440 & n.97 (2000). In establishing the NSR program, Congress surely could not have envisioned such a confusing and haphazard regulatory scheme.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

ENVIRONMENTAL DEFENSE, ET AL.,
Petitioners,
v.
DUKE ENERGY, ET AL,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF *AMICI CURIAE* NATIONAL PARKS CONSERVATION ASSOCIATION AND OUR CHILDREN'S EARTH FOUNDATION IN SUPPORT OF PETITIONER

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H.R. Rep. 294, 95th Cong. (1977),
1977 U.S.C.C.A.N. 1077, 1283 (1977) 15
S. Rep. No. 127, 95th Cong. (1977) 22

ADMINISTRATIVE MATERIALS:

40 C.F.R § 51.166(b)(2) ..... passim
40 C.F.R § 51.166(b)(3) 5, 10
40 C.F.R § 51.166(b)(4) 7
40 C.F.R § 51.166(b)(21) 6, 7, 8
40 C.F.R § 51.166 (i) 3
40 C.F.R § 51.166 (j) 3
45 Fed. Reg. 52676 (Aug. 7, 1980) 5
47 Fed. Reg. 7836 (Feb. 23, 1982) 5
47 Fed. Reg. 6017 (Feb. 10, 1982) 5
57 Fed. Reg. 32314 (July 21, 1992) 8
64 Fed. Reg. 35714 (July 1, 1999) 22
69 Fed. Reg. 4566 (Jan. 30, 2004) 2
70 Fed. Reg. 25162 (May 12, 2005) 22
70 Fed. Reg. 39104 (July 6, 2005) 22

ADDITIONAL MATERIALS:

Enforcement Chart – New Source Review, An E&E Publishing Special Report, available at: http://www.eenews.net/features/special_reports/nsr/enforcement_chart.php (last visited July 16, 2006) 14

Great Smoky Mountains National Park Management Folio #2, Air Quality, available at http://www.nps.gov/grsm/gsmsite/airquality01.pdf (last visited July 16, 2006) 18, 19

National Park Service, "Air Quality in the National Parks, 2nd Edition," available at: http://www2.nature.nps.gov/air/Pubs/aqnps. cfm. 17, 18

National Park Service, "Great Smoky Mountains National Park: Nature & Science: Air Quality," available at: http://www.nps.gov/grsm/pphtml/subenvironmentalfactors23.html (last visited July 16, 2006) 18, 19

National Park Service, "Great Smoky Mountains National Park: Nature & Science: Overview," available at: http://www.nps.gov/ grsm/pphtml/nature.html (last visited July 16, 2006). 17

National Park Service, Rocky Mountain National Park, Nitrogen Deposition Correlated with Changes in Lake Organisms, available at: http://www.nps.gov/romo/ downloads/CDRLC/summaries/diatoms.pdf (last visited July 16, 2006) 21

National Park Service, Shenandoah National Park, Nature and Science, Air Quality, available at: http://www.nps.gov/shen/pphtml/ subenvironmentalfactors23.html(last visited July 16, 2006). 20

National Park Service, Shenandoah National Park, Nature and Science, Scenic Vistas, available at: http://www.nps.gov/shen/pphtml/ subenvironmentalfactors25.html (last visited July 16, 2006). 20

National Research Council, "Protecting Visibility in National Parks and Wilderness Areas" (1993) 16

Rocky Mountain National Park Initiative, "Nitrogen Deposition: Issues and Effects in Rocky Mountain National Park (Technical Background Document)," March 2004, available at: http://www.cdphe.state.co.us /ap/rmnp/noxtech.pdf (last visited July 16, 2006) . . . 21

U.S. Department of Justice, U.S. EPA, "U.S. Sues Electric Utilities in Unprecedented Action to Enforce the Clean Air Act," Press Release, November 3, 1999 23

United States Environmental Protection Agency, "Controlling Power Plant Emissions: Overview"available at http://www.epa.gov/mercury control_emissions/ index.htm (last visited July 16, 2006) 15

United States Environmental Protection Agency, "Frequent Questions About Mercury," available athttp://www.epa.gov/mercury/ faq.htm#3(last visited July 20, 2006) 16

United States Environmental Protection Agency, "NO_x: What is it? Where does it come from?," available at http://www.epa.gov/air/urbanair/ nox/what1.html (last visited July 16, 2006) 15

United States Environmental Protection Agency, "Six Common Air Pollutants: Chief Causes of Concern," available at: http://www.epa.gov/air/urbanair/ nox/chf1.html (last visited July 16, 2006). 15

United States Environmental Protection Agency, "Six Common Air Pollutants: Chief Causes of Concern," http://www.epa.gov/air/urbanair/ so2/chf1.html (last visited July 16, 2006). 15

United States Environmental Protection Agency, "SO_2: What is it? Where does it come from?," available at http://www.epa.gov/air/urbanair/ so2/what1.html (last visited July 16, 2006) 14

U.S. Energy Information Administration, "Electric Power Monthly" (July 2006), available at: http://www.eia.doe.gov/cneaf/electricity/epm/ epm_sum.html (last visited July 16, 2006) 14

Webb, et al. 2005, "Occurrence and Distribution of Mercury in Mammoth Cave National Park," Paper No. 167-7, Geological Society of America. 20

STATEMENT OF INTEREST[1]

The National Parks Conservation Association ("NPCA") is a nonprofit citizen organization whose purpose is to protect and enhance the natural and cultural resources of America's National Park System as well as forests, wilderness, and open space areas through research, public education, advocacy, and litigation. NPCA was founded in 1919 and today has over 450,000 members nationwide. NPCA, with its members, is active in protecting air quality in natural areas of interest.

As part of its activities, NPCA is a plaintiff in two Clean Air Act citizen suits against the Tennessee Valley Authority alleging the same type of violations at issue in this case. *Nat'l Parks v. TVA*, Case No. 05-6329 (6th Cir.) (pending) and *National Parks Conservation v. TVA*, No. 06-10729-J (11th Cir.) (pending). NPCA contends that these alleged violations (from TVA plants located in Alabama and Tennessee) cause tens of thousands of tons of needless pollution annually and are having a significant adverse impact on protected federal lands, including Great Smoky Mountains National Park.

Our Children's Earth Foundation ("OCE"), a non-profit membership organization, is dedicated to protecting the public, especially children, from the health impacts of pollution and other environmental hazards and to improving environmental quality for the public benefit. OCE has members in Tennessee, and to protect the interests of its members, particularly from the impact of TVA's alleged excessive emissions of sulfur dioxide

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief either in whole or in part. No persons other than amici curiae or their counsel made any monetary contributions to its preparation or submission. Both Petitioner and Respondent consented to this filing; their letters of consent are being submitted with the brief.

("SO_2") (a precursor to fine particle pollution),[2] OCE has joined NPCA as a plaintiff in the Clean Air Act citizen suit in Tennessee. *Nat'l Parks v. TVA*, Case No. 05-6329 (6th Cir.) (currently pending).

SUMMARY OF ARGUMENT

The Fourth Circuit's decision in this case did precisely what the Clean Air Act's enforcement scheme was designed to prevent: allow a facial challenge to a regulation in the context of an enforcement action. 42 U.S.C. § 7607(b)(2). This brief in support of the petitioner focuses on the plain language of the applicable regulations and shows how the Fourth Circuit's decision is contrary to that language. In summary, the Fourth Circuit failed to analyze the regulatory text at all, but instead based its holding on a theory that the regulations are inconsistent with the statute. Such an invalidation of the regulations is proper only in the D.C. Circuit, and that circuit has upheld these same regulations. Allowing this type of collateral attack on a validly promulgated regulation would undermine the enforcement scheme created by Congress for the Clean Air Act and many other environmental statutes. Furthermore, given current serious air pollution problems in National Parks caused by coal-fired power plants, and the number of those plants that have allegedly violated the regulations at issue here, the Fourth Circuit's error will have widespread adverse consequences.

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[2] *See* (Proposed) Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Interstate Air Quality Rule), 69 Fed. Reg. 4566, 4572 (Jan. 30, 2004)("Mass associated with ammonium sulfate concentrations make up a significant portion (25 to 50 percent) of the annual average $PM_{2.5}$ mass. The largest sulfate contributions to $PM_{2.5}$ mass occur during the summer season mainly within a large multi-State area centered near Tennessee and Southwest Virginia.").

ARGUMENT

A. THE UNDERLYING ISSUE IN THE CASE

Under the Clean Air Act's Prevention of Significant Deterioration program ("PSD"), 42 U.S.C. §§ 7470-79, if an owner of a major stationary source makes a "major modification," then it becomes subject to emission limits known as "Best Available Control Technology" ("BACT"). 40 C.F.R §§ 51.166 § (i) and (j). In this case, the plaintiffs alleged that Duke Energy undertook 29 projects at eight coal-fired power plants between 1988 and 2000, and each of these projects met the definition of "major modification." Pet. App. 25a-26a. Because these projects were "major modifications," Duke Energy should have obtained stringent BACT emission limits for them, but it never did. The plaintiffs seek an order requiring Duke Energy to obtain the emission limits and operate under them, potentially leading to reductions in hundreds of thousands of tons in sulfur dioxide and nitrogen oxide emissions.

In order to have a "major modification" for the purposes of the PSD program, there must be: (1) a physical change in or change in the method of operation at a major stationary source that would (2) result in a significant net emissions increase. 40 C.F.R. § 51.166(b)(2). The Fourth Circuit's opinion focused on this second element. The plaintiffs contended that in order to have a modification, there must be an increase in ***annual*** actual emissions. Pet. App. 6a-7a. The defendant utility contended that there must be an increase in the ***hourly*** rate of emissions. Pet. App. 6a-7a. Which test applies has practical real world consequences.

The measure of a power plant's ability to generate power in a particular hour is known as its "capacity." Pet. App. 67a. A power plant, as it ages, may be able to maintain its maximum capacity when it is operating, but it may not be available to

generate power around the clock, particularly because malfunctions, or forced outages, cause unplanned shutdowns. *United States v. Ohio Edison Company*, 276 F. Supp. 2d 829, 838 (S.D. Ohio 2003). Accordingly, a power company can undertake massive overhauls that eliminate forced outages, significantly improving a plant's availability, on an ***annual*** basis, yet leave its "capacity" to generate power in any particular ***hour*** when it is operating, unchanged. In this case, Duke Energy argued that its projects did not trigger the PSD regulations because the projects did not increase the facilities' hourly capacity. Pet. App. 7a. Thus, if the applicable regulations are interpreted to require an increase in ***annual*** actual emissions, the projects, assuming they are found to be non-routine, triggered the PSD regulations. On the other hand, if the regulations are interpreted to require an increase in the ***hourly*** rate of emissions, the projects did not trigger the PSD regulations.

B. THE FOURTH CIRCUIT'S INTERPRETATION CANNOT BE SUPPORTED BY THE LANGUAGE OF THE REGULATIONS

In this case, the Fourth Circuit, under the guise of "interpreting" the applicable regulations, held that in order to have a "major modification," a project must lead to an increase in the hourly rate of emissions, not just an increase in annual actual emissions. Pet. App. 6a-7a. However, the language of the applicable regulations cannot support the Fourth Circuit's interpretation. Accordingly, the only way the Fourth Circuit could have achieved its holding was by invalidating the regulation, something it had no jurisdiction to do. 42 U.S.C. 7607(b)(2). This brief closely examines the applicable regulations to show that they cannot support the Fourth Circuit's result.

In 1980, EPA issued regulations providing guidance to States on how to structure PSD programs in their State Implementation Plans ("SIPs"). 45 Fed. Reg. 52676 (Aug. 7, 1980). (EPA recodified these regulations into 40 C.F.R. § 51.166 in 1987). The states of North Carolina and South Carolina incorporated these federal regulations into their SIPs in 1982. *See* 47 Fed. Reg. 7836, 7837 (Feb. 23, 1982) (North Carolina) and 47 Fed. Reg. 6017 (Feb. 10, 1982) (South Carolina). Thus it is the language of 40 C.F.R. § 51.166 that must be the focus in this case.

The regulations define "major modification," subject to key exceptions discussed below, as:

> [A]ny physical change in or change in the method of operation of a major stationary source that would result in a significant ***net emissions increase*** of any pollutant subject to regulation under the Act.

40 C.F.R § 51.166(b)(2)(I) (emphasis added). Pet. App. 103a.

"Net emissions increase" is defined as follows:

> [T]he amount by which the sum of the following exceeds zero: (a) [a]ny increase in ***actual emissions*** from a ***particular physical change or change in the method of operation*** at a stationary source; and (b) [a]ny other increases and decreases in ***actual emissions*** at the source that are contemporaneous with the ***particular change*** and are otherwise creditable.

40 C.F.R § 51.166(b)(3)(i)(emphasis added). Pet. App. 104a.

The key analysis under this definition is whether the particular "change" will lead to an increase in "actual emissions." This term "actual emissions" has a lengthy definition:

> (i) "Actual emissions" means the actual rate of emissions of a pollutant from an emissions unit, as determined in accordance with paragraphs (b)(21)(ii)- (b)(21)(iv) of this section.
>
> (ii) In general, actual emissions as of a particular date shall

equal the average rate, ***in tons per year***, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is ***representative of normal source operation***. The reviewing authority may allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(iii) The reviewing authority may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(iv) ***For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.***

40 C.F.R § 51.166(b)(21) (emphasis added).

Given this language, to determine whether an increase in "actual emissions" will occur, one generally looks to the facility's annual emissions for the two years preceding the project, 40 C.F.R § 51.166(b)(21)(ii), and compares them to the facility's emissions after the project. This analysis, of course, must occur before a project is undertaken, and so EPA, in promulgating the regulation, had to develop some methodology for estimating what actual emissions would be after the project was completed. EPA chose to define "actual emissions" for a facility that had not begun "normal operations" to be the facility's "potential to emit"[3] after the project. 40 C.F.R

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[3] The regulations define "potential to emit" as: "the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or

§ 51.166(b)(21)(iv).

This test is commonly known as the "actual to potential" test, Pet. App. 57a, and it sweeps many sources into the PSD program because of its inherent assumption that sources, after making a modification, will operate "24 hours per day, 365 days per year." *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901, 916 (7th Cir. 1990) ("*WEPCO*"). The Seventh Circuit, however, rejected the application of this test to existing power plant sources, holding that if a power plant is engaged in a "like-kind replacement," then EPA cannot properly say that the source making the modification has not commenced normal operations. *Id.* (interpreting 40 C.F.R § 51.166(b)(21)(iv)).

After the Seventh Circuit's 1990 ruling, EPA created a special emissions increase test exclusively for power plants that allows a plant owner to determine whether emission increases will occur by comparing actual emissions prior to the change with its projection of what annual emissions will be after the change, but only if it reports to EPA on its post-project emissions. 57 Fed. Reg. 32314, 32335 (July 21, 1992)(adding 40 C.F.R § 51.166(b)(21)(v)). This 1992 regulation has no application in this case, however, because at the time most of the projects occurred, the rule change was not incorporated into the North Carolina and South Carolina SIPs. Furthermore, Duke Energy never reported on its post-project emissions, so it could not benefit from the rule's provisions in any event.

Whether the Seventh Circuit in *WEPCO* was correct regarding the proper methodology for determining post-project "actual emissions" is, for the purposes of this case, irrelevant.[4]

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the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source." 40 C.F.R § 51.166(b)(4).

[4] EPA was prepared to proceed in the case using the actual-to-future-actual test. Pet. App. 58a, n. 17.

While both the "actual-to-potential" and *WEPCO* methodologies are grounded in the language of the regulations themselves, that regulatory language simply does not support an interpretation yielding an hourly emissions test. *See* 40 C.F.R § 51.166(b)(21)(ii) ("[A]ctual emissions . . . shall equal the average rate, in ***tons per year***, at which the unit actually emitted the pollutant . . . .").

Although the Fourth Circuit, as mentioned above, never discussed the actual language of the regulations, the district court did, finding that an exception contained within the definition of "major modification," 40 C.F.R § 51.166(b)(2)(iii)(f), (the "increased hours" exclusion) imposes, despite the language set forth above, the hourly emissions test. Pet. App. 72a. The language focused upon by the district court is as follows:

> (2)(i)"Major modification" means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.
>
> (ii) Any net emissions increase that is significant for volatile organic compounds shall be considered significant for ozone.
>
> (iii) A physical change or change in the method of operation shall not include:
>
> > (a) Routine maintenance, repair, and replacement;
> >
> > (b) Use of an alternative fuel or raw material by reason of any order under sections 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plan pursuant to the Federal Power Act;
> >
> > (c) Use of an alternative fuel by reason of an order or rule under section 125 of the Act;

> (d) Use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;
> (e) Use of an alternative fuel or raw material by a stationary source . . . ;
> (f) ***An increase in the hours of operation or in the production rate***, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Subpart I or 40 CFR 51.166.
>
> . . .

40 C.F.R § 51.166(b)(2)(emphasis added). The district court ruled that the "increased hours" exclusion required "that in calculating post-project emissions, the EPA must hold the pre-project and post-project hours and conditions of operation constant." Pet. App. 72a.

The district court's analysis was incorrect. As mentioned above, the "modification" test has two elements. First, a source must determine whether a physical or operational change will occur. 40 C.F.R. 51.166(b)(2)(i). Second, if so, the source must determine whether that change will result in a significant net emissions increase. *Id.* By its explicit terms, the "increased hours" exclusion applies at the first step of the analysis, not the second step. Furthermore, the definition of "net emissions increase," 40 C.F.R. § 51.166(b)(3)(i), analyzes whether "a particular physical change or change in the method of operation" at a source has increased emissions. A project that falls within the "increased hours" exclusion could never qualify as the type of "change" that subsection (b)(3)(i) addresses. To put it another way, if the "increased hours exclusion" applies to a project, it would be unnecessary to go on and conduct the "emissions increase" analysis because the activity in question

would have already been found exempt.

Thus the plain language of the regulations does not support a conclusion that the "increased hours" exclusion affects the calculation of a "net emissions increase." As the court said in *United States v. Cinergy Corp.*, 384 F. Supp. 2d 1272, 1278 (S.D. Ind. 2005) (appeal pending): "the plain meaning of the increased hours exclusion is that an increase in hours or production rate are not a 'physical change' and thus cannot, alone, be a modification. Increased hours and production rate are not excluded from the definition of 'modification'; that is, if a physical change results in an increase in hours of operation that causes a net emissions increase, a modification has occurred."[5]

Accordingly, what the Fourth Circuit should have done in this case is determine, by carefully reading the regulations, whether the district court's interpretation of the regulations was correct. Instead, the Fourth Circuit failed to "interpret" the regulations at all. Instead, it examined whether the regulations comported with its view of what the statute required, and that type of review was reserved by Congress for the D.C. Circuit, which upheld the regulations in *New York v. Environmental Protection Agency*, 413 F.3d 3. 18-20 (D.C. Cir. 2005).

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[5] Indeed, if the hours-of-operation exclusion were interpreted to include increases in hours of operation that resulted from actual physical modifications, it would lead to the following anomalous result: if a project made physical changes to a source that increased the source's capacity to produce in any particular hour, but did not increase the source's availability to operate more hours, then that project would trigger PSD, but if the project increased ***both*** capacity and availability, it would not.

C. ALLOWING A COLLATERAL ATTACK OF AN ENVIRONMENTAL REGULATION IN THE CONTEXT OF AN ENFORCEMENT ACTION WOULD UNDERMINE THE ENFORCEMENT SCHEME OF MANY ENVIRONMENTAL STATUTES

Allowing the type of collateral attack on the regulations that occurred in this case would not only undermine the Clean Air Act's enforcement scheme, but also similar restrictions on judicial review established by Congress in many other environmental statutes. Examples abound:

- ***Clean Air Act***. 42 U.S.C. § 7607(b)(1) provides in pertinent part (emphasis added) that:

  > ***A petition for review of action of the Administrator in promulgating*** any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, ***or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. . . .***

42 U.S.C. § 7607(b)(2) provides in pertinent part that:

> Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. . . .

Applying these provisions, the Fifth Circuit, in the context of a criminal proceeding for violations of asbestos removal work practice standards, refused to entertain an argument that the regulation was invalid. *See United States v. Ho*, 311 F.3d 589, 607 (5th Cir. 2002), *cert. denied* 539 U.S. 914, 123 S. Ct. 2274 (2003). *See also Getty Oil Co. (Eastern Operations), Inc. v. Ruckelshaus*, 467 F.2d 349, 359 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) ("Failure to utilize the section 307 proceeding forecloses review in a civil or criminal proceeding for enforcement."); *Commonwealth of Virginia v. United States*, 74 F.3d 517, 525 (4th Cir. 1996)("Because Congress wanted prompt and conclusive review in air quality controversies, it channeled (to the courts of appeals) all challenges, regardless of their basis, of EPA rules and final actions."); *Madison Gas & Electric v. U.S. E.P.A.*, 4 F.3d 529 (7th Cir. 1993) (Challenge to national feature of acid rain program, such as tradability of emission allowances, may be brought only in Court of Appeals for the District of Columbia Circuit, even if impact of program varied greatly across the country).

- ***Clean Water Act***. 33 U.S.C. § 1369(b)(2); *see Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992)("Reviewability under section 1369 carries a peculiar sting. . . . If an EPA action is reviewable under section 1369(b)(1), then it "shall not be subject to judicial review in any civil or criminal proceeding for enforcement." 33 U.S.C. § 1369(b)(2)."); *see also American Paper Inst., Inc. v. EPA*, 882 F.2d 287, 288-89 (7th Cir. 1989)("the Clean Water Act bars review in enforcement proceedings

of actions that could have been reviewed earlier"); *Natural Resources Defense Council, Inc. v. Outboard Marine Corp.* 702 F. Supp. 690, 693 (N.D. Ill. 1988)("Section 1369(b)(1)(F) permits review of an EPA action issuing or denying a permit only in the Circuit Court of Appeals. Section 1369(b)(2) then expressly bars review of an EPA-issued or EPA-denied permit in any District Court enforcement proceeding.");

- ***Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")***, 42 U.S.C. § 9613(a); *see U.S. Ecology, Inc. v. Carlson*, 638 F. Supp. 513, 518-19 (C.D. Ill. 1986)(challenge to a listing on the National Priorities List can only be brought in the D.C. Circuit);

- ***Toxic Substances Control Act ("TSCA")***, 15 U.S.C. § 2618(a); *see Dow Chemical Co. v. Costle*, 484 F. Supp. 101, 104 (D. Del. 1980)(court ruled it had no jurisdiction because, although chemical company claimed it was challenging interpretation and application of regulation imposing a ban on manufacture, it was in fact challenging validity of regulation itself);

- ***Resource Conservation and Recovery Act ("RCRA")***, 42 U.S.C. § 6976(a)(2);

- ***Safe Drinking Water Act***, 42 U.S.C. § 300j-7(a).

In statute after statute, Congress has consistently established a sensible system for judicial review. Challenges to regulations must be brought in the D.C. Circuit, and usually within 60 days of promulgation. Enforcement actions are not to be hindered by such challenges. The Fourth Circuit's decision upsets this carefully crafted system for the administration of justice.

D. THE OUTCOME IN THIS CASE COULD HAVE BROAD IMPLICATIONS ON THE AIR QUALITY IN THE NATION'S NATIONAL PARKS

This case and others filed by the Department of Justice and citizens seek to bring into compliance sources that have attempted to evade New Source Review requirements on a massive scale. According to the Greenwire News Service, in addition to this case, there are nine cases pending around the country covering 39 coal-fired power plants. In addition, government action has led to clean-ups of 25 other such plants.[6]

Overall, according to the Energy Information Administration, this year, roughly fifty percent of the electricity generated in the United States was from coal.[7] Over 65% of sulfur dioxide ("SO_2") released to the air, or more than 13 million tons per year, comes from electric utilities, especially those that burn coal.[8] Another 18% comes from non-utility, coal burning industries. *Id.* Similarly, utilities are responsible for 22% of the nation's nitrogen oxide ("NO_x") emissions,[9] and coal-fired power plants emit into the atmosphere over 50 tons

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[6] "Enforcement Chart – New Source Review, An E&E Publishing Special Report."Available at: http://www.eenews.net/features/special_reports/nsr/enforcement_chart.php (last visited July 16, 2006).

[7] U.S. Energy Information Administration, "Electric Power Monthly" (July 2006), available at: http://www.eia.doe.gov/cneaf/electricity/epm/epm_sum.html (last visited July 16, 2006).

[8] United States Environmental Protection Agency, "SO_2: What is it? Where does it come from?," available at http://www.epa.gov/air/urbanair/so2/what1.html (last visited July 16, 2006).

[9] United States Environmental Protection Agency, "NO_x: What is it? Where does it come from?," available at http://www.epa.gov/air/urbanair/nox/what1.html (last visited July 16, 2006).

of mercury each year.[10]

These pollutants cause tremendous damage. SO_2 contributes to respiratory illness, particularly in children and the elderly, and aggravates existing heart and lung diseases. It also contributes to the formation of acid rain, which damages trees, crops, historic buildings, and monuments and makes soils, lakes, and streams acidic. It also causes the formation of atmospheric particles that cause visibility impairment, most noticeably in national parks.[11] NO_x is one of the main ingredients involved in the formation of ground-level ozone, which can trigger serious respiratory problems and reacts to form nitrate particles, acid aerosols, as well as NO_2, which also cause respiratory problems. NO_x also contributes to formation of acid rain, to nutrient overload that deteriorates water quality, to visibility impairment, and to global warming. It also reacts to form toxic chemicals.[12]

The link between SO_2 and NO_x and visibility impairment is particularly well-known. Twenty-nine years ago, Congress stated: "[the] visibility problem is caused primarily by emission into the atmosphere of sulfur dioxide, oxides of nitrogen and particulate matter, especially fine particulate matter, from inadequate[ly] controlled sources." H.R. Rep. 294, 95th Cong. (1977), at 204, 1977 U.S.C.C.A.N. 1077, 1283 (1977). According to the National Research Council, emissions of

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[10] United States Environmental Protection Agency, "Controlling Power Plant Emissions: Overview"available at http://www.epa.gov/mercury/control_emissions/index.htm (last visited July 16, 2006).

[11] United States Environmental Protection Agency, "Six Common Air Pollutants: Chief Causes of Concern," http://www.epa.gov/air/urbanair/so2/chf1.html (last visited July 16, 2006).

[12] United States Environmental Protection Agency, "Six Common Air Pollutants: Chief Causes of Concern," available at: http://www.epa.gov/air/urbanair/nox/chf1.html (last visited July 16, 2006).

sulfur oxides from electric utilities "alone are responsible for slightly more than one-half of anthropogenic light extinction. This is because sulfates are the predominant component of anthropogenic haze in the East and electric utilities are the predominant emitter of SO_2 (sulfur dioxide) in the East. National Research Council, "Protecting Visibility in National Parks and Wilderness Areas" (1993), at 216.

Another important pollutant linked to coal combustion is mercury. Mercury in the air eventually settles into water or onto land where it can be washed into water. Once deposited, certain microorganisms can change it into methylmercury, a highly toxic form that builds up in fish, shellfish and animals that eat fish. Mercury exposure at high levels can harm the brain, heart, kidneys, lungs, and immune system of people of all ages. High levels of methylmercury in the bloodstream of unborn babies and young children may harm the developing nervous system, making the child less able to think and learn. Birds and mammals that eat fish are more exposed to mercury than other animals in water ecosystems. Similarly, predators that eat fish-eating animals may be highly exposed. At high levels of exposure, methylmercury's harmful effects on these animals include death, reduced reproduction, slower growth and development, and abnormal behavior.[13]

Impacts of these pollutants on our nation's National Parks is pronounced. Great Smoky Mountains National Park encompasses more than 800 square miles of the Southern Appalachians in Tennessee and North Carolina and features elevations ranging from 875 feet to 6,643 feet. Abundant rainfall (averaging 55 inches a year in the valleys and 85 inches on some peaks) and high summertime humidity provide excellent growing conditions for an amazing variety of plants:

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[13] United States Environmental Protection Agency, "Frequent Questions About Mercury," available athttp://www.epa.gov/mercury/faq.htm#3(last visited July 20, 2006).

approximately 100 species of native trees, more than 1,400 additional flowering plant species, and at least 4,000 species of non-flowering plants. Forests blanket almost 95 percent of the park; 25 percent is old-growth forest.[14] The park also contains 74 percent of the spruce-fir forests in the southern Appalachians, and is home to the largest remnant red spruce-Fraser fir ecosystem in the world.[15] The park is also home to more than 200 species of birds, 66 types of mammals, 50 native fish species, 39 varieties of reptiles, 43 species of amphibians, and one of the most diverse populations of lungless salamanders. Mollusks, millipedes, and mushrooms also are found in record variety.[16]

Unfortunately, Great Smoky Mountains National Park also has the highest rate of nitrogen and sulfur deposition of any monitored location in North America. As a result, rainfall in the park is 5-10 times more acidic than natural rainfall. In fact, ten percent of streams in the Smokies sampled over an eight-year period were so acidic that they threatened the viability of brook trout populations. Furthermore, 90 percent of clouds sampled in the park have been found to be unnaturally acidic. Acidic clouds bathe the park's high elevation forests

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[14] National Park Service, "Great Smoky Mountains National Park: Nature & Science: Overview," available at: http://www.nps.gov/grsm/pphtml/nature.html (last visited July 16, 2006).

[15] National Park Service, "Air Quality in the National Parks, 2nd Edition," p. 37, available at: http://www2.nature.nps.gov/air/Pubs/aqnps.cfm.

[16] National Park Service, "Great Smoky Mountains National Park: Nature & Science: Overview," available at: http://www.nps.gov/grsm/pphtml/nature.html (last visited July 16, 2006).

during much of the growing season.[17] Acids in the soil poison microorganisms, as well as trees and other plants.[18] Research shows that some high elevations in Great Smoky Mountains National Park are receiving so much airborne nitrogen that the soil suffers from advanced nitrogen saturation.[19]

The Smokies also suffer from high levels of ozone pollution. Ozone exposures in the park are among the highest in the East. On average, ozone levels over the ridgetops of the park are up to two times higher than in nearby cities, including Knoxville and Atlanta.[20] The number of days with ozone levels above the national ambient air quality standard have risen sharply since 1989 posing threats to vegetation, as well as park visitors and employees. In 1999, the park recorded 52 "unhealthy" days that exceeded the standard.[21] Studies indicate that 30 species of plants experience leaf damage when exposed to controlled ozone levels similar to those that occur in the Smokies. Up to 90 percent of black cherry trees and tall milkweed plants in numerous park locations show symptoms of

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[17] National Park Service, "Air Quality in the National Parks, 2nd Edition," p. 37, available at: http://www2.nature.nps.gov/air/Pubs/aqnps.cfm.

[18] Great Smoky Mountains National Park Management Folio #2, Air Quality, available at http://www.nps.gov/grsm/gsmsite/airquality01.pdf (last visited July 16, 2006).

[19] National Park Service, "Great Smoky Mountains National Park: Nature & Science: Air Quality," available at: http://www.nps.gov/grsm/pphtml/subenvironmentalfactors23.html (last visited July 16, 2006).

[20] *Id.*

[21] National Park Service, "Air Quality in the National Parks, 2nd Edition," p. 41, available at: http://www2.nature.nps.gov/air/Pubs/aqnps.cfm.

ozone damage. In general, researchers have found that ozone exposure and damage are worse at higher elevations.[22]

Power plant emissions are not only major contributors to the pollution problems in the Smokies set out above, but they are also chiefly responsible for visibility degradation in the park.[23] Since 1948, based on regional airport records, average visibility in the southern Appalachians has decreased 40% in winter and 80% in summer. Annual average visibility at Great Smoky Mountains National Park is 25 miles, compared to natural conditions of 93 miles. During severe haze episodes, visibility has been reduced to under one mile. This degradation in visibility not only affects how far one can see from a scenic overlook, but also how well one can see. *Id.* Sulfate-caused haze causes colors to appear washed out and obscures landscape features. This pollution typically appears as a uniform whitish haze, different from the natural mist-like clouds for which the Smokies were named. *Id.* Increasingly, visitors no longer see distant mountain ridges because of this haze. This increased degradation has been traced directly to the presence of sulfates, the concentrations of which have increased in the region by 27% from 1984-1999. *Id.*

The Smokies are not the only national park suffering from visibility degradation. Shenandoah National Park is known internationally for spectacular mountain scenes. Skyline Drive was constructed in the 1930's as a scenic drive along the crest of the Blue Ridge mountains within Shenandoah National Park. The road was designed and constructed to provide scenic views

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[22] Great Smoky Mountains National Park Management Folio #2, Air Quality, available at http://www.nps.gov/grsm/gsmsite/airquality01.pdf (last visited July 16, 2006).

[23] National Park Service, "Great Smoky Mountains National Park: Nature & Science: Air Quality," available at: http://www.nps.gov/grsm/pphtml/subenvironmentalfactors23.html (last visited July 16, 2006).

within the park and into the Piedmont plateau to the east and the Shenandoah Valley to the west. 76 overlooks, or pullouts with parking, were constructed so motorists could stop at intervals along the Drive and enjoy the views.[24] According to the National Park Service. however, "air pollution, particularly during the summer season, has significantly degraded the distance, color, contrast and landscape details of park views from Skyline Drive, the Appalachian Trail, and high points in the park."[25] Like the Smokies, Shenandoah has also been adversely impacted by acid deposition. *Id.*

Other National Park units are suffering similar air pollution detriments caused in large part by power plant emissions. Researchers have found that mercury levels in the hair of endangered Indiana bats collected from the Mammoth Cave National Park are two to three times EPA's recommended limit for humans. They believe that the mercury contamination is likely the result of emissions from coal-fired power plants.[26]

In Rocky Mountain National Park, more than twenty years of study have linked changes in the chemistry of the park's water and soils, as well as damage to park species like the Engelmann spruce, to rising nitrogen levels in the park.[27] The

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[24] National Park Service, Shenandoah National Park, Nature and Science, Scenic Vistas, available at: http://www.nps.gov/shen/pphtml/subenvironmentalfactors25.html (last visited July 16, 2006).

[25] National Park Service, Shenandoah National Park, Nature and Science, Air Quality, available at: http://www.nps.gov/shen/pphtml/subenvironmentalfactors23.html(last visited July 16, 2006).

[26] Webb, et al. 2005. Occurrence and Distribution of Mercury in Mammoth Cave National Park, Paper No. 167-7, Geological Society of America.

[27] National Park Service, Rocky Mountain National Park, Nitrogen Deposition Correlated with Changes in Lake Organisms, available at: http://www.nps.gov/romo/downloads/CDRLC/summaries/diatoms.pdf (last

nitrogen pollution has been traced to pollution from from power plants, factories, oil and gas wells, fertilizer, and animal feedlots. *Id.* High-elevation ecosystems at Rocky Mountain National Park are particularly vulnerable to nitrogen deposition because the park's granite bedrock and shallow soils do not provide much chemical buffering, and the short growing seasons at high-elevation limit the amount of time plants have to absorb nitrogen during the year. These alpine plants evolved under very low nitrogen conditions, so they are less tolerant of excess nitrogen added to the environment by air pollution.[28]

These parks and others are suffering these injuries even though Congress sought to remedy the air pollution problem in parks almost 30 years ago with the Clean Air Act Amendments of 1977. Pub. L. 95-95, 91 Stat. 685 (1977). This Act granted special protections to National Parks. *See* 42 U.S.C. § 7472 (designating National Parks over 6000 acres in size as Class I areas) and 42 U.S.C. § 7475(d) (requiring additional measures to insure that new and modified sources seeking permits under the PSD program do not adversely impact Class I areas). Indeed, the Act contains an entire program dedicated to improving and protecting visibility in Class I areas. 42 U.S.C. §§ 7491-92.

Although EPA has recently developed two rulemakings to curb park-harming emissions from power plants, the Regional Haze Rule, 64 Fed. Reg. 35714, (July 1, 1999) and 70 Fed. Reg. 39104 (Regional Haze Regulations and Guidelines for Best Available Retrofit Technology (BART) Determinations), and the Clean Air Interstate Rule ("CAIR"), 70 Fed. Reg. 25162

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visited July 16, 2006).

[28] Rocky Mountain National Park Initiative, "Nitrogen Deposition: Issues and Effects in Rocky Mountain National Park (Technical Background Document)," March 2004, available at: http://www.cdphe.state.co.us /ap/rmnp/noxtech.pdf (last visited July 16, 2006).

(May 12, 2005), those rules do not supersede the New Source Review rules, and they do not take effect until 2015. *See* 70 Fed. Reg. 39145 (2005).

As Congress debated the 1977 Amendments to the Clean Air Act, it believed that old, uncontrolled plants were being phased out:

> There are in the United States approximately 200 old coal-fired power plants over 20 years of age. These plants are moving into the second half of their useful service life. They are operating at reduced capacity factors--some are used on cyclical or peaking loads only and most operate at less than 50 percent of their stated capacity. They are typically among the most expensive units to operate on a system. Most will be totally phased out of operation in the next 5 to 20 years.

S. Rep. No. 127, 95th Cong. (1977), at 128 (Statement of Senator Baker). Thus, as the D.C. Circuit noted in 1980:

> Implementation of the statute's definition of "modification" will undoubtedly prove inconvenient and costly to affected industries; but the clear language of the statute unavoidably imposes these costs except for *de minimis* increases. The statutory scheme intends to "grandfather" existing industries; but the provisions concerning modifications indicate that this is not to constitute a perpetual immunity from all standards under the PSD program. If these plants increase pollution, they will generally need a permit. Exceptions to this rule will occur when the increases are de minimis, and when the increases are offset by contemporaneous decreases of pollutants. . . ."

Alabama Power Co. v. Costle, 636 F.2d 323, 400 (D.C. Cir. 1980); *see also Ohio Edison*, 276 F. Supp. 2d at 850 ("Congress chose to 'grandfather' existing pollution sources from the NSPS and NSR provisions at the time the statute was enacted. . . . Congress did not, however, intend that such

existing sources be forever spared the burden and expense of installing pollution control devices.").

This case and others filed by the Department of Justice and citizens seek to bring into compliance sources that have attempted to evade New Source Review requirements on a massive scale. When EPA and the Department of Justice filed this case in 1999, it also proceeded against six other utility companies covering 17 power plants and estimated that the failure of the identified utilities to comply with the New Source Review regulations had "resulted in tens of millions of tons of sulfur dioxide, nitrogen oxides, and particulate matter illegally emitted into the air." [29] Amici believe that bringing Duke and other violators of New Source Review requirements into compliance will be a significant step forward in solving the air quality problems faced by the nation's National Parks.

CONCLUSION

For the foregoing reasons, the judgment of the Fourth Circuit Court of Appeals should be reversed.

Respectfully submitted this 21st of July, 2006.

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[29] U.S. Department of Justice, U.S. EPA, "U.S. Sues Electric Utilities in Unprecedented Action to Enforce the Clean Air Act," press release, November 3, 1999. Available at: http://www.usdoj.gov/opa/pr/1999/November/524enr.htm (last visited July 15, 2006).

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ENVIRONMENTAL DEFENSE, NORTH CAROLINA SIERRA CLUB, and NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP CITIZEN LOBBY/EDUCATION FUND,

Petitioners,

v.

DUKE ENERGY CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE STATES OF NEW JERSEY, ARIZONA, KENTUCKY, MICHIGAN, WASHINGTON AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Bowles v. Seminole Rock & Sand Co.,
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Eagle-Picher Indus., Inc. v. EPA,
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Halogenated Solvents Indus. Alliance v. Thomas,
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Harrison v. PPG Industries, Inc.,
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Cited Authorities

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Lubrizol Corp. v. Train,
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Michigan v. EPA,
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Monongahela Power Co. v. Reilly,
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42 U.S.C. § 6976(a)(1) 19, 20

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42 U.S.C. § 7407(d) 5

42 U.S.C. § 7408(a)(2) 5

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42 U.S.C. § 7410(a) 2, 7

42 U.S.C. § 7410(a)(2) 7

42 U.S.C. § 7410(a)(2)(J) 8

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42 U.S.C. § 7607(b) 2, 3, 4, 8

42 U.S.C. § 7607(b)(1) 2, 8, 13

42 U.S.C. § 7607(b)(2) 2, 13, 17

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40 C.F.R. pt. 51, subpt. G 6, 7

40 C.F.R. § 51.102 7

40 C.F.R. § 51.166(b)(2)(iii)(f) 16

40 C.F.R. pt. 51, App. S 7

40 C.F.R. pt. 51, App. V 7

40 C.F.R. pt. 51, App. W 6, 7

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S. Rep. No. 91-1146, 91st Cong., 2d Sess. 41 (1970) .. 13, 19

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70 Fed. Reg. 61,081 (Oct. 20, 2005) 10

70 Fed. Reg. 65,984 (Nov. 1, 2005) 11

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Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality (NAAQS) and Regional Haze Regulations, *available at*http://www.epa.gov/ttn/chief/eidocs/eiguid/eiguidfinal_nov2005.pdf 7

Green Book Nonattainment Areas for Criteria Pollutants, *available at* http://www.epa.gov/oar/oaqps/greenbk/index.html 5

INTEREST OF *AMICI CURIAE*

The threshold issue presented in this case is whether the Fourth Circuit in *United States v. Duke Energy*[1] erred by ruling on the substantive validity of EPA's nationally applicable regulations governing the Prevention of Significant Deterioration ("PSD") program of the Clean Air Act ("CAA" or "Act").[2] Because the States have the primary responsibility under the CAA for achieving and maintaining the air quality standards to protect the public health of the nation, *see Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 470, 490 (2004), the decision below affects the interests of *amici* States in two fundamental ways.

First, the Fourth Circuit's decision undermines the State Implementation Plan ("SIP") process, the principal mechanism by which States exercise their responsibility for implementing the CAA's regulatory programs, including New Source Review ("NSR"). *See* 42 U.S.C. § 7410. Pursuant to Section 110 of the CAA, States are required to develop, implement, and enforce SIPs, a component of which is the NSR program, to attain and maintain the National Ambient Air Quality Standards ("NAAQS"). *Id.* Section 307(b)'s framework for the judicial review of nationally applicable regulations "only in" the District of Columbia Circuit Court of Appeals ensures uniform and final determinations regarding the validity of rules that

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[1] 411 F.3d 539 (4th Cir. 2005).

[2] The PSD provisions of the CAA, 42 U.S.C. §§7470-7492, cover geographic areas that have already attained the National Ambient Air Quality Standards for an air pollutant. Areas that are in nonattainment for one or more air pollutants are subject to the Act's Nonattainment New Source Review ("NNSR") program, 42 U.S.C §§ 7501-7515. The PSD and NNSR programs are together referred to New Source Review. Although only the PSD requirements are at issue in this case, given the similarity in the two programs, the Fourth Circuit's decision also applies to areas governed by the NNSR program.

form the minimum standards for SIPs.[3] *See* 42 U.S.C. § 7607(b). The States rely on the certainty of this review process in developing their SIPs, a resource-intensive process that must be completed within strict deadlines. *See* 42 U.S.C. §§ 7410(a) and 7502(b). The Fourth Circuit's decision exposes to judicial review – by multiple courts – longstanding EPA regulations on which the States have based the CAA programs in their SIPs for decades. This will inhibit the efficient use of state and judicial resources and undermine the credibility of state regulations implementing CAA programs and determinations made by state environmental officials in reliance on the plain language of EPA's regulations. *See Alaska Dep't of Envtl. Conservation*, 540 U.S. at 516 ("[r]egulated persons and entities should be able to consult an agency staff with certainty and confidence") (Kennedy, J., dissenting). This would create "a substantial risk of seriously inconsistent results and an inevitable delay in the effectuation of the important national policies underlying the Clean Air Act." *Dayton Power & Light Co. v. EPA*, 520 F.2d 703, 708 (6th Cir. 1975). Most importantly, it could frustrate state efforts to reduce air pollution to levels that protect the public health with an adequate margin of safety. 42 U.S.C. § 7409.

Second, allowing any court to rule on the validity of nationally applicable regulations in enforcement cases risks creating uneven minimum standards across the nation. Because air pollution recognizes no boundaries, air pollution resulting

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[3] Section 307(b)(2) prohibits judicial review in a civil enforcement proceeding of EPA actions "with respect to which review could have been obtained under paragraph (1)." 42 U.S.C. § 7607(b)(2). Section 307(b)(1), in turn, mandates a petition for review of EPA action within sixty days of the action in, among other things, "promulgating any national primary or secondary ambient air quality standard . . . or any other nationally applicable regulations promulgated, or final action taken, by the Administrator." 42 U.S.C. § 7607(b)(1). Section 307(b)(1) grants the Circuit Courts of Appeal jurisdiction to review, among other things, EPA actions approving or promulgating SIPs and local or regional EPA final actions, if the petition for review is filed within sixty days of the notice date. *Id.*

from modifications in one state could harm air quality in neighboring States, compromising the ability of downwind States "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of the population." 42 U.S.C. § 7401(b)(1).

SUMMARY OF ARGUMENT

As this Court has noted, the States' development of SIPs to implement the NAAQS is a "lengthy and expensive task." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479 (2001). To meet the SIP requirements, each State must (1) develop comprehensive and accurate emissions inventories for all sources of air pollution, *e.g.*, stationary, fugitive, and mobile sources, (2) use sophisticated models to predict emissions from these sources well into the future, taking into account the interstate transport of air pollutants, and (3) develop strategies for meeting the various NAAQS promulgated by EPA. *See* 42 U.S.C. § 7610; 40 C.F.R. pt. 51. The PSD and NNSR programs are just two of the tools that States must have in place – and update as necessary based on regulations EPA issues – to battle air pollution. Not only is the process of updating SIPs complex and resource-intensive, but States are also under strict deadlines to meet the NAAQS and to enact SIP revisions to comply with EPA-mandated changes to NSR and other programs. In addition to meeting their CAA obligations, States must often comply with notice and comment requirements mandated by state administrative laws, adding more time and expense to the process.

In light of this challenging task, States need clear and expeditious guidance on the "rules of the game." Since the inception of the 1970 CAA, States have come to rely upon EPA to provide guidance and on the D.C. Circuit, pursuant to the Act's judicial review provision, 42 U.S.C. § 7607(b), to provide the needed certainty regarding regulations that are national in scope, as well as the NAAQS themselves, in relatively quick fashion. The preparation and implementation of SIPs would become unworkable if the rules of the game are instead developed on a piecemeal basis in challenges raised against

regulations in enforcement cases throughout the nation. This would be particularly true if courts in different areas of the country were to disagree on the validity of nationally applicable regulations.

Here, the Fourth Circuit's ruling in an enforcement action, effectively invalidating the PSD regulations, conflicts with the judicial review provision's limitations on the scope of substantive challenges to nationally applicable regulations. Specifically, the ruling conflicts with Section 307(b)'s mandate that the D.C. Circuit have exclusive jurisdiction to adjudge the validity of nationally applicable regulations. *See* 42 U.S.C. § 7607(b). As evidenced by this Court's decisions and the legislative history of the Act, Congress wanted to ensure consistent national application of nationwide regulations. This congressional intent will be frustrated if the Fourth Circuit's decision – which directly conflicts with the D.C. Circuit's ruling on the same issue, *see New York v. EPA*, 413 F.3d 3, 19-20 (D.C. Cir.), *reh'g denied*, 431 F.3d 802 (2005) ("*New York I*") – stands. Moreover, in concluding that regulations stemming from the same statutory definition must be interpreted identically, the Fourth Circuit failed to apply this Court's precedent regarding the standard of review afforded an agency's interpretation of its own regulations. Finally, given that several other environmental statutes have nearly identical judicial review provisions, the Fourth Circuit's ruling could also lead to the disruption of other nationwide environmental programs.

ARGUMENT

I. TO SUCCESSFULLY CARRY OUT THEIR PRIMARY RESPONSIBILITY OF ACHIEVING AND MAINTAINING THE NAAQS THROUGH THEIR SIPS, STATES MUST BE ABLE TO RELY ON FINAL DETERMINATIONS REGARDING NATIONALLY APPLICABLE REGULATIONS.

The States are primarily responsible for achieving and maintaining the health-based NAAQS for each of the six criteria pollutants: particulate matter, sulfur dioxide, ozone, nitrogen dioxide, carbon monoxide and lead.[4] 42 U.S.C. § 7408(a)(2). *See Alaska Dep't of Envtl. Conservation*, 540 U.S. at 469-70; *Am. Trucking Ass'ns*, 531 U.S. at 465. The States meet this mandate through the development of SIPs, which is a time-sensitive and resource-intensive process. For the SIP framework to work as intended – to timely achieve and maintain the NAAQS, *see Train v. NRDC*, 421 U.S. 60, 66-67 (1975) – the States must be able to develop and implement their SIPs in reliance on clear and conclusive decisions regarding the validity of nationally applicable regulations, as provided by Section 307(b) of the Act. Exposing nationally

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[4] Each of the six criteria air pollutants – particulate matter ($PM_{2.5}$ and PM_{10}), sulfur dioxide, ozone, nitrogen dioxide, carbon monoxide and lead – that are regulated under Title I of the CAA has its own air quality standard. *See* 40 C.F.R. pt. 50. Areas are classified as either having attained (or unable to be classified) or not attained the NAAQS for each air pollutant. 42 U.S.C. § 7407(d). Currently, thirty-one states and the District of Columbia have eight-hour ozone standard nonattainment areas. *See* Green Book Nonattainment Areas for Criteria Pollutants, *available at* http://www.epa.gov/oar/oaqps/greenbk/index.html. Twenty states and the District of Columbia have areas that are in nonattainment of the $PM_{2.5}$ standard. *Id.* Thirteen states and Puerto Rico have areas that are in nonattainment of the PM_{10} standard. Six states and Guam have areas that are in nonattainment of sulfur dioxide. *Id.* Five states have areas that are in nonattainment of carbon monoxide. *Id.* And two states have areas that are in nonattainment of lead. *Id.*

applicable regulations to collateral attack in enforcement cases would undermine the entire federal-state framework of the CAA that is intended to achieve and maintain ambient air quality standards that protect the public health and welfare.

A. The Effective and Efficient Development of State Implementation Plans Requires Extensive Effort and Use of Significant Resources by Each State.

The SIP has been described as the "heart" of the 1970 CAA Amendments. *Union Electric Co. v. EPA*, 427 U.S. 246, 249-50 (1976). The process of developing a SIP is arduous. *See Am. Trucking Ass'ns*, 531 U.S. at 479 (referring to "the lengthy and expensive task of developing state implementation plans"). This is especially true for a NAAQS attainment SIP, which is necessary when EPA formally finds that the air quality in a defined area does not meet the national standard. An attainment SIP is a plan tailored to that nonattainment area designed to achieve the NAAQS within a statutorily prescribed time frame. *See* 42 U.S.C. §§ 7407, 7409. A State with a designated nonattainment area begins the SIP process by developing "a comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in such area" that must be included in the SIP. 42 U.S.C. § 7502(c)(3). The emissions inventory is the foundation for SIPs that implement EPA's ozone, fine particulate matter, and visibility rules, and the federal emission inventory regulations are extensive and complex. *See* 40 C.F.R. pt. 51.

Once the State has its complete emissions inventory, the State then conducts extensive and complex air quality modeling. *See* 40 C.F.R. pt. 51, subpt. G and App. W. The modeling process requires the State to project emissions levels in the year in which the State is required to demonstrate attainment. This requires the State to account for all changes that will reduce (as well as increase) emissions, *e.g.*, known and foreseeable changes in emission standards and rules, and anticipated growth (or decline) of source sectors, including construction of new sources and/or retirement of existing

sources. *See id.* and App. V. The State must also account for air pollution that may enter the State from upwind sources in other States.[5] *See* 42 U.S.C. § 7410(a)(2). Equipped with this and other data,[6] the State must model the ambient levels of pollutants in the nonattainment areas for the statutory attainment year. *See* 40 C.F.R. pt. 51, subpt. G and App. W. If the model does not show attainment in that year, the State must develop and model emission control strategies to demonstrate attainment. These computer simulations are so complex that a single strategy may take weeks or months to process and can produce extraordinary volumes of data that then must be distilled into a decipherable product. Once the State settles on a preferred control strategy to achieve attainment, the State must demonstrate to EPA that the emission reductions will be surplus, quantifiable, enforceable and permanent. *See id.* and App. S. Finally, the State embarks on its rulemaking process to formally adopt these strategies after proposal and public comment. 42 U.S.C. § 7410(a); 40 C.F.R. § 51.102. The rules must then be sent to EPA for approval. 42 U.S.C. § 7410(a).

At a minimum, whether it applies to a nonattainment area or an area that is already attaining the NAAQS, the SIP must include certain mandatory programs. For example, each

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[5] The interstate transport of air pollution has been recognized by Congress, EPA and the courts. *See, e.g.*, 42 U.S.C. § 7426 (Interstate pollution abatement); *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1037 (D.C. Cir. 2001) (recognizing that some air pollution "is caused or augmented by emissions from other states" and upwind region emissions may significantly contribute to downwind attainment).

[6] The State must also collect meteorological data so that the chemical reactions and physical movements of these particles in the air can be modeled as accurately as state of the art tools allow. EPA has provided an "Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality (NAAQS) and Regional Haze Regulations," *available at* http://www.epa.gov/ttn/chief/eidocs/eiguid/eiguidfinal_nov2005.pdf.

SIP for a nonattainment area must include the NNSR program and each SIP for an attainment area must include PSD rules. 42 U.S.C. § 7410(a)(2)(J). These minimum program elements must be adopted by each as enforceable state law, which generally requires a full rulemaking proceeding. EPA itself recognized that "[p]erhaps the biggest potential disadvantages to implementing the new applicability provisions as part of our base programs are the time and effort required to revise existing State programs and to have the revised programs approved as part of the SIP." Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR), 67 Fed. Reg. 80,186, 80,241 (Dec. 31, 2002) ("2002 NSR Rule").

B. To Perform Their Role Under the CAA Effectively, the States Require the Finality and Certainty that Section 307(b) is Intended to Provide.

For the SIP framework to function as intended – to attain and maintain the NAAQS within the statutorily required time periods – the judicial review structure mandated by Section 307(b) must be followed. The States' ability to plan for and meet their obligations under the CAA depends on the stability of nationwide regulations. Congress addressed this important need when it demanded that the federal minimum requirements be reviewed, if at all, by filing a petition in the D.C. Circuit within sixty days of notice of EPA's action. 42 U.S.C. § 7607(b)(1). Such rules may not be reviewed in an enforcement proceeding when that review "could have been obtained" by the D.C. Circuit and the validity of such rules will not be disturbed once reviewed by the D.C. Circuit (and this Court). *See* 42 U.S.C. § 7607(b).

Congress' balanced approach, which allows for judicial review but also provides the certainty necessary to stabilize the SIP process, is jeopardized by the Fourth Circuit's decision. Based on what the Fourth Circuit believed to be an irrebutable rule of statutory construction , that court held that the statute requires EPA to interpret the statutory term "modification" for PSD purposes identically to the way it interprets that term in the

context of the NSPS program. *Duke Energy*, 411 F.3d at 550. Finding that the NSPS regulations define "modification" in terms of whether a change increases a facility's hourly emissions rate, the Fourth Circuit concluded that EPA must read its PSD regulations to also establish an hourly rate test. *Id.* In reaching this conclusion, the Fourth Circuit effectively invalidated the PSD regulations' unambiguous annual emission test, replacing it with the NSPS hourly emissions test.[7] *Id.*

The decision reached by the Fourth Circuit in an enforcement proceeding has, to the alarm of the States, shaken the foundation upon which the SIPs are based. The integrity of the state planning process is impaired, as the projections and modeling upon which the State's control strategies and rules are based lack certainty. More fundamentally, the States' ability to assure their citizens healthy air in a timely manner that meets national air quality standards is damaged. *See Lubrizol Corp. v. Train*, 547 F.2d 310, 315 (6th Cir. 1976) ("incessant litigation and inconsistent decisions" would cause "needless delays in the implementation of important national programs").

Review of nationally applicable rules in the several Courts of Appeal will cause the precise evil that Congress sought to avoid when it enacted the judicial review restrictions in Section 307(b).[8] For example, now that the Fourth Circuit

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[7] The Fourth Circuit stated that, consistent with the scope of its jurisdiction under Section 307(b), it did not invalidate the regulations under review. *See Duke Energy, supra*, 411 F.3d at 549, n.7. As the United States pointed out, however, in its petition for rehearing, "requiring the EPA to interpret the PSD regulations to adopt the NSPS test for measuring emissions increases is inconsistent with the plain text of the regulations and thus is not an "interpretation" at all, but an invalidation." U.S. Br. at 12. By way of analogy, the Fourth Circuit's decision could be likened to a court holding that EPA regulations that require buses to limit their emissions apply only to double-decker buses; this "interpretation" would leave the regulations on the books, but render them meaningless.

[8] In EPA's proposed rule to change the NSR emissions test for electric generating units to an hourly test, EPA itself noted that the "need to

has ruled that PSD modifications must be determined using the NSPS hourly maximum emissions rate test, States are faced with the question of whether they need to change their PSD regulations to implement the test adopted by the Fourth Circuit, demonstrate that their actual annual test is more stringent than the hourly maximum emissions rate test, or just to ignore the *Duke Energy* decision as an anomaly. Similarly, States must decide whether to allow regulated parties to continue to use "netting," which the D.C. Circuit previously ruled was required under the PSD program's method of determining emissions increases but which is prohibited in determining whether sources have been modified under the NSPS program. Moreover, given that the Seventh Circuit is currently considering, on interlocutory appeal in the enforcement proceeding against Cinergy Corporation, whether to affirm the district court's rejection of the same emissions test argument raised by Duke Energy,[9] it is entirely possible that the Seventh Circuit will reach the opposite result of the Fourth Circuit. If that were to occur, States that have adopted the *Duke Energy* approach may find it necessary to resume the actual annual emissions approach of the PSD regulations. All of this uncertainty and disorder has ensued despite the fact that the D.C. Circuit itself upheld the very PSD regulations that the Fourth Circuit invalidated. *See New York I*, 413 F.3d at 19-20.

The cooperative federalism of the CAA accords States real choices to adopt control measure options and determine the

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provide national consistency for EGUs is apparent" in the wake of the Fourth Circuit decision, which "create[d] a potential disparity in the way we interpret the program in States in the Fourth Circuit compared to States in other Circuits in the country." Prevention of Significant Deterioration, Nonattainment New Source Review, and New Source Performance Standards: Emissions Test for Electric Generating Units, 70 Fed. Reg. 61,081, 61,082 (Oct. 20, 2005) ("2005 NSR Rule").

[9] *United States v. Cinergy*, No. 1:99-cv-01693-LJM-VSS (S.D. Ind.).

necessary "specific, source-by-source emission limitations" to employ in their SIPs. *See Train v. NRDC* , 421 U.S. at 79; *Michigan v. EPA*, 213 F.3d 663, 686-87 (D.C. Cir. 2000). To be able to effectively exercise their options, States must know what EPA expects, as it is to EPA that the States look for the basic rules. *See New York I*, 413 F.3d at 21 (recognizing that "[w]hile states are responsible for writing SIPs, the Act gives EPA responsibility for developing basic rules for the NSR program . . . ."), Proposed Rule to Implement the Fine Particle National Ambient Air Quality Standards, 70 Fed. Reg. 65,984, 65,990 (Nov. 1, 2005) ("For the States to be successful in developing local plans showing attainment of standards, we must do our part to develop standards and programs to reduce emissions from sources that are more effectively and efficiently addressed at the national level."). To determine whether those rules are valid, the States must be able to rely on a single round of review by the D.C. Circuit and this Court, not the various circuit courts. Without such certainty, the States would be less able to evaluate their choices and determine, for example, whether to adopt the federal regulations, to submit revised SIPs, or to apply for an equivalency determination. Indeed, States would be unable to submit an equivalency determination without knowing with what standards their programs must be "at least as stringent." *See* 42 U.S.C. § 7416. States cannot efficiently or effectively develop their SIPs – or successfully implement the SIPs – until States can rely on the rules of the game.

In short, allowing the validity of nationally applicable regulations to be adjudicated in any enforcement proceeding denies the States any certainty in their own regulatory programs and subjects States to potentially more numerous SIP revisions to account for the ever shifting and conflicting regulatory framework. Such a result directly conflicts with Congress' mandate to conserve judicial resources, prevent duplicative or piecemeal litigation, eliminate the risk of contradictory decisions, *see Virginia v. EPA*, 74 F.3d 517, 525 (4th Cir. 1996), *NRDC v. Reilly*, 788 F. Supp. 268, 273 (E.D. Va. 1992), and ultimately clean our nation's air. This mischief, set in motion, must be undone to restore the integrity of the judicial

review process that Congress mandated, and assure the States of the validity of their own implementing programs.

II. THE FOURTH CIRCUIT'S RULING CONFLICTS WITH THE CLEAN AIR ACT'S REQUIREMENT THAT THE D.C. CIRCUIT DECIDE THE VALIDITY OF NATIONALLY APPLICABLE REGULATIONS.

By ruling that the Act requires EPA to interpret the PSD regulations and NSPS regulations the same for "modifications," the Fourth Circuit effectively invalidated the PSD regulations as written, holding that the NSPS regulations must be applied instead. Despite the Fourth Circuit's attempt to couch its ruling as an "interpretation" of national regulations, *see Duke Energy*, 411 F.3d at 549, n.7, this ruling contravenes Section 307(b) of the Act, which gives the Court of Appeals for the D.C. Circuit exclusive jurisdiction to rule on the validity of nationally applicable regulations in order to ensure "an even and consistent national application" of such regulations, and with this Court's administrative law precedent.

A. Section 307(b)'s Pre-Enforcement Review of CAA Regulations in the D.C. Circuit and the Deferential Standard of Review Afforded EPA Regulatory Interpretations Promote Stability in State Planning and Administration of the Act.

Because Section 307(b) bars challenges to the validity of nationally applicable regulations in enforcement cases, the court's review authority in deciding whether to uphold an EPA interpretation of its regulations is narrowly circumscribed. This structure, combined with this Court's precedent establishing a deferential standard of review of an agency's interpretation of its own regulations, provides States with a measure of stability in their implementation of the Act's complex regulatory requirements.

The States' reliance on the D.C. Circuit having the final word on the validity of nationally applicable regulations, the importance of which is detailed in the preceding section, has firm grounding in Section 307(b)'s structure and legislative history. Pursuant to Section 307(b)(1), challenges to "nationally applicable regulations" must be filed in the D.C. Circuit within sixty days of promulgation. 42 U.S.C. § 7607(b)(1). If an EPA action that is nationally applicable "could have been" challenged in the D.C. Circuit, such an action "shall not be subject to judicial review in civil or criminal proceedings for enforcement." *Id.*, § 7607(b)(2). As this Court has recognized, the structure of Section 307(b)(1) furthers the congressional purposes of "insur[ing] that the substantive provisions of the [CAA regulations] would be uniformly applied and interpreted and that the circumstances of [their] adoption would be quickly reviewed by a single court intimately familiar with administrative procedures." *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284 (1978); *see* S. Rep. No. 91-1146, 91st Cong., 2d Sess. 41 (1970) (giving the D.C. Circuit exclusive jurisdiction "[b]ecause many of these administrative actions are national in scope and require even and consistent national application"). *See also Virginia v. United States*, 74 F.3d at 525 (the structure of Section 307(b) is based on a "concern for judicial economy; to wit, the risk of duplicative or piecemeal litigation, and the risk of contradictory decisions") (citation omitted); *United States v. Ethyl Corp.*, 761 F.2d 1153 (5th Cir. 1985) (the plain language shows Congress's intent to avoid protracted and inconsistent adjudications over the validity of EPA's emission standards); *Chrysler Corp. v. EPA*, 600 F.2d 904, 911 (D.C. Cir. 1979) (Congress intended "to limit judicial review as to forum and time so as to assure expeditious, authoritative and central judicial resolution of issues which were national in impact and which could hold up the timely accomplishment of the Act's objectives if not settled at the outset.") (internal quotations and citation omitted).

As a result of this structure, it is a long-established practice for the D.C. Circuit to decide, in direct appeals of EPA rulemakings, whether CAA regulations of national applicability are consistent with the Act and supported by the administrative

record. Given that regulatory challenges must be filed within sixty days of a rule's promulgation and are based on the administrative record, these cases proceed to decision relatively quickly.[10] States rely on the judicial review process set forth in Section 307(b) to carry out their responsibilities under the Act. *See* Point I, *supra*.

Next, this Court's administrative law precedent – as the Fourth Circuit has recognized – sets a formidable bar for a defendant in an enforcement proceeding seeking to overturn an agency interpretation of its own regulations. In this context, an agency's interpretation of its regulations is "controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)) (citations omitted);*Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994); *see Kentuckians for the Commonwealth, Inc. v. Rivenburgh* , 317 F.3d 425 (4th Cir. 2003) ("The reviewing court does not have much leeway in undertaking this interpretation . . . because the agency is entitled to interpret its own regulation.").

Thus, in light of Section 307(b)'s limit on substantive regulatory challenges and the standard of review under this Court's precedent, the only question in a CAA enforcement case where the defendant has challenged an EPA interpretation of its regulations is whether the agency's interpretation is "plainly erroneous or inconsistent with the regulation."[11]

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[10] The D.C. Circuit's review of the validity of the 1980 PSD regulations was delayed by twenty years pursuant to an unusualsettlement agreement between EPA an industry. Such a lengthy delay is the exception to the rule of prompt review. *See, e.g., New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006) (ruling on validity of EPA regulations less than three years after promulgation of final rule, which included an approximately one-year delay for administrative reconsideration of the regulations).

[11] The court may also have to address the question of whether the defendant had to challenge the EPA interpretation in the D.C. Circuit.

Thomas Jefferson Univ., 512 U.S. at 512. As an initial matter, the district court should look to the plain meaning of the regulations (as expressed in the regulatory language and preamble), the purpose of the regulations, the practical consequences of suggested interpretations, and the agency's previous interpretations. *See, e.g., Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 910-18 (7th Cir. 1990) (hereinafter, *"WEPCo"*)(using these tools in reviewing EPA's interpretation of its PSD regulations). If the court finds that the Agency's interpretation in the proceeding to enforce its regulations is consistent with the regulations, there is no basis for the court to look to the statute or legislative history. [12] As long as the agency's interpretation of its regulation in the enforcement proceeding is not plainly erroneous, the court's inquiry is at an end and it must give "controlling weight" to the agency's regulatory interpretation against defendant's attack. *See Thomas Jefferson Univ.*, 512 U.S. at 512; *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965).

If, however, the agency's interpretation does not follow from the plain meaning of a regulation and the regulatory preamble (*e.g.*, one or more relevant terms in the regulation is ambiguous), reference to the statute and legislative history, as well as decisions of this Court and of the D.C. Circuit, may be appropriate in addressing a defendant's argument that EPA's interpretation of its own regulation is erroneous. *See Seminole Rock*, 325 U.S. at 414 ("The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various [agency] constructions."); *see also WEPCo*, 893 F.2d at 917-18 (relying on the D.C. Circuit's statutory interpretation set forth

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See New York I, 413 F.3d at 20-21 (discussing proper forum for challenging EPA statement in preamble that explained provision in 1980 PSD regulations).

[12] Indeed, where a court does resort to evaluating congressional intent, it is not interpreting the meaning of the regulations, but is instead addressing the regulations' validity under the statute.

in *Alabama Power Co. v. Costle*, 636 F.2d 323, 379 (D.C. Cir. 1979) to construe the concept of "potential to emit" under the PSD regulations). But given the structure of Section 307(b), the consideration of congressional intent should be limited to dealing with the specific regulatory issue left open, *e.g.*, a single vague regulatory term should not open up the Agency's entire regulatory approach to challenge. This follows from the corollary principle that a defendant may not, in the guise of challenging an EPA "interpretation," invoke the statute or legislative history to challenge the validity of regulations themselves. *See Ethyl Corp.*, 761 F.2d at 1155-57 (the district court lacked subject matter jurisdiction to consider the substantive validity of EPA's CAA regulations); *Potomac Electric Power Co. v. EPA*, 650 F.2d 509, 513 (4th Cir. 1981) (hereinafter, "*PEPCo*") (under Section 307(b), the Fourth Circuit lacks jurisdiction to rule upon arguments that "may be read as challenging not only the EPA's interpretation of its regulations but also the regulations themselves."). As discussed above, such an approach promotes stability in States' implementation of the Act.

B. The Fourth Circuit Did Not Follow Section 307(b) or this Court's Administrative Law Precedent.

Applying the principles discussed in Point II.A, the Fourth Circuit should have limited its review to determining whether the district court erred in holding that EPA's reading of its PSD regulations as establishing an actual annual emissions increase test for determining PSD applicability was plainly erroneous.[13] Instead, the Fourth Circuit began – and ended – its analysis based on what it believed was required by the definition of "modification" in the Act and by this Court's

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[13] Specifically, this analysis would have included an assessment of whether EPA's interpretation of the "increased hours of operation exclusion," 40 C.F.R. § 51.166(b)(2)(iii)(f), does not apply to increased hours of operation made possible by the equipment replacement project.

decision in *Rowan Cos. v. United States*, 452 U.S. 247 (1981). *Duke Energy*, 411 F.3d at 547-51.

The Fourth Circuit's approach conflicts with Section 307(b) of the Act because it ruled on the merits of an argument that could have been, and in fact was, raised before the D.C. Circuit in a challenge to the validity of the PSD regulations. Duke Energy argued below that when Congress enacted the PSD program in 1977, it incorporated by reference EPA's regulatory definition of "modification" under the NSPS program, which only applies if the modification would cause an increase in the unit's maximum hourly emissions rate. *See* Brief in Support of Duke Energy's Motion for Summary Judgment in *United States v. Duke Energy Corp.* (M.D.N.C., Case No. 1:00 CV 1262) (Jan. 31, 2003) at 5 ("Congress adopted the NSPS concept of 'modification' into the NSR program enacted in the 1977 Clean Air Act Amendments.").[14] Duke Energy had in fact made the very same argument before the D.C. Circuit in challenging the validity of the PSD regulations. *See* Joint Brief of Industry Petitioners in *New York v. EPA* (D.C. Cir., Case No. 02-1387) (Oct. 26, 2004) at 6 ("Congress adopted the NSPS concept of 'modification' into the NSR program enacted in the 1977 CAA Amendments.").[15] The D.C. Circuit rejected this argument, finding that Congress's adoption by reference of the definition of modification in the NSPS provisions did not mandate an hourly emissions rate test for NSR. *New York I*, 413 F.3d at 19-20. Having had the opportunity to raise that issue in proper forum – the D.C. Circuit – Duke Energy may not challenge the same regulation in an enforcement action. 42 U.S.C. § 7607(b)(2). *See Monongahela Power Co. v. Reilly*, 980 F.2d 272, 275 (4th

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[14] Based on this premise, Duke Energy contended that no modifications of its power plant had occurred because the equipment replacement projects were not expected to increase the maximum hourly emissions rate.

[15] Duke Energy was involved in the *New York* litigation as a member of the Utility Air Resources Group ("UARG").

Cir. 1992) ("Because [Section 307(b)(1)] embodies a grant of exclusive jurisdiction, it appears that if the District of Columbia [Circuit] has jurisdiction over the present action, the district court does not."); *see also WEPCo*, 893 F.2d at 914, n.6 (the Seventh Circuit lacks jurisdiction "to review the propriety of the NSPS regulations themselves"); *PEPCo*, 650 F.2d at 513 (the Fourth Circuit lacks jurisdiction to rule upon arguments that "may be read as challenging not only the EPA's interpretation of its regulations but also the regulations themselves."); *cf. Waste Mgmt. of Illinois, Inc. v. EPA*, 714 F. Supp. 340 (N.D. Ill. 1989) (pursuant to Resource Conservation and Recovery Act's judicial review provision, modeled after Section 307(b)(1) and (2) of the CAA, district court lacked jurisdiction because although Waste Management styled its complaint as challenge to an EPA interpretation, challenge was in fact to the validity of the regulations themselves, which could only be brought in the D.C. Circuit).

The Fourth Circuit's failure to follow Section 307(b) is further evidenced by the court's misapplication of the *Rowan Cos.* case. In *Rowan Cos.* , the Treasury Department's regulations at issue were subject to review under 28 U.S.C. § 1346(a)(1), which provides in relevant part that the district court shall have original jurisdiction (concurrent with the United States Court of Federal Claims) of "[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected." Unlike judicial review pursuant to Section 307(b) of the Act, there was no statutory bar in *Rowan Cos.* on the district court ruling on the validity of the regulations that the government sought to apply. The Fourth Circuit's failure to recognize this important difference in the scope of jurisdiction resulted in it misapplying *Rowan Cos.* to the case at bar.

In addition, the Fourth Circuit's willingness to expand the scope of arguments that defendants can raise in CAA enforcement cases is inconsistent with congressional intent that judicial review in such cases be limited to challenges to the agency's application of its regulation to a particular defendant's

conduct. For example, when Congress broadened the D.C. Circuit's jurisdiction in the 1977 CAA amendments to encompass "any other nationally applicable regulations promulgated . . . by the Administrator under [the Act]," *see Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 590 (1980), it also explicitly rejected a recommendation by an advisory group, the Administrative Conference of the United States, that Section 307(b) be amended to permit the validity of a regulation to be challenged as a defense in an enforcement proceeding. *See* H.R. Rep. No. 95-294, 95 th Cong., 1st Sess. 324 (1977) (referring to the rejection of recommendation D.1, which would have allowed defendants to challenge the validity of a regulation in defending an enforcement action). The Fourth Circuit's decision to allow a challenge concerning the validity of a regulation in an enforcement case directly contravenes this congressional intent. *See* S. Rep. No. 91-1196, 91st Cong., 2d Sess. 41 ("Of course, the person regulated would not be precluded from seeking review at the time of enforcement insofar as the subject matter applies to him alone.") (emphasis added).

III. THE FOURTH CIRCUIT'S RULING THREATENS THE UNIFORMITY AND CERTAINTY OF NATIONWIDE REQUIREMENTS UNDER OTHER ENVIRONMENTAL LAWS.

Allowing the Fourth Circuit's decision to stand could frustrate the implementation of other environmental laws in light of the fact that Congress gave the D.C. Circuit exclusive jurisdiction to review the validity of national regulations in other statutes as well. *See* 33 U.S.C. § 2717(a) (Oil Pollution Prevention Act) ('OPPA"); 42 U.S.C. § 300j-7(a)(1) (Safe Drinking Water Act); 42 U.S.C. § 6976(a)(1) (Resource Conservation and Recovery Act) ("RCRA"); 42 U.S.C. § 9613(a) (Comprehensive Environmental Response, Compensation, and Recovery Act) ("CERCLA"); *see also* 30 U.S.C. § 1276(a)(1) (Surface Mining Control and Reclamation Act). Similar to Section 307(b) of the CAA, these statutory provisions establish a limited period to petition for review to

challenge the validity of regulations, ranging from forty-five days under the Safe Drinking Water Act to ninety days under OPPA, RCRA, and CERCLA. *See id.*

In interpreting the judicial review provisions under these statutes, courts look to decisions interpreting Section 307(b) for guidance. For example, in *Halogenated Solvents Indus. Alliance v. Thomas*, 783 F.2d 1262, 1265 (5th Cir. 1986), in which an industry group sought to challenge EPA's adoption of Recommended Maximum Contaminant Levels ("RMCLs") under the Safe Drinking Water Act, the court looked to the legislative history of Section 307(b) of the CAA in deciding whether to transfer the case to the D.C. Circuit. After concluding that the statutory language was not conclusive as to whether this type of challenge had to be brought in the D.C. Circuit, the court reasoned that having the D.C. Circuit rule on the challenge would further congressional intent. Like promoting Congress' intent for an "even and consistent national application" of CAA regulations, the court reasoned that "[s]ince the RMCLs are national in scope . . . [a] needless conflict would result if were we to retain jurisdiction over this petition, invalidate the RMCLs as arbitrary, capricious, or not based on substantial evidence, and the D.C. Circuit then reviewed and upheld the revised primary regulations." *Id.* at 1265; *see also Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 905, 916, n.60 (D.C. Cir. 1985) (citing Section 307(b) in interpreting CERCLA's judicial review provision so as to promote "prompt, uniform, 'pre-enforcement' review of CERCLA regulations").

As a result, if the Fourth Circuit's decision stands, the uniformity and certainty of nationwide requirements applicable under these other environmental regulations could be threatened. Regional judicial review of agency actions regarding regulations of national application would result in a failure to achieve uniform and reliable minimum national standards. In addition, this Court would be called upon more often to settle different interpretations among the circuit courts regarding the validity of various provisions in several environmental laws.

CONCLUSION

For the foregoing reasons, the judgment of the Fourth Circuit Court of Appeals should be reversed.

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IN THE

Supreme Court of the United States

ENVIRONMENTAL DEFENSE, NORTH CAROLINA SIERRA CLUB, and NORTH CAROLINA PUBLIC INTEREST RESEARCH GROUP CITIZEN LOBBY/EDUCATION FUND,

Petitioners,

v.

DUKE ENERGY CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, DELAWARE, ILLINOIS, IOWA, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, NEW HAMPSHIRE, NEW MEXICO, OREGON, RHODE ISLAND, AND VERMONT, AND THE COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION, AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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Bluewater Network v. EPA,
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Cited Authorities

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FDIC v. Philadelphia Gear Corp., 476 U.S. 426 (1986) 17

Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439 (D.C. Cir. 1988), *cert. denied*, 488 U.S. 1010 (1989) 12

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Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579 (D.C. Cir. 1997), *cert. denied sub nom., Pollin v. Paralyzed Veterans of Am.*, 523 U.S. 1003 (1998) 20

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Puerto Rican Cement Co. v. EPA, 889 F.2d 292 (1st Cir. 1989) ..... *passim*

Cited Authorities

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Train v. NRDC,
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United States v. American Elec. Power Service Corp.,
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United States v. Cinergy Corp.,
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United States v. Ethyl Corp.,
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Wisconsin Elec. Power Co. v. Reilly ("WEPCo"),
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Cited Authorities

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FEDERAL STATUTES

United States Code ("U.S.C.")

42 U.S.C. § 7411(a)(3) 14
42 U.S.C. § 7411(a)(4) ..... *passim*
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40 C.F.R. § 51.166(b)(21)(i)(1987) 9
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40 C.F.R. § 51.166(b)(21)(iv)(1987) 9, 22
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40 C.F.R. § 51.166(b)(23) 15
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40 C.F.R. § 51.166(i)(2) 8
40 C.F.R. § 51.166(j)(3) 8
40 C.F.R. § 52.01(d) 11
40 C.F.R. § 60.14(a) 9, 14
40 C.F.R. § 60.14(b)(2) 9
40 C.F.R. § 60.14(e)(5) 15
40 C.F.R. § 60.14(h) 15

Cited Authorities

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MISCELLANEOUS

Federal Register

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43 Fed. Reg. 26,380 (June 19, 1978) 11

45 Fed. Reg. 52,676 (Aug. 7, 1980) ..... *passim*

56 Fed. Reg. 27,630 (June 14, 1991) 9

57 Fed. Reg. 32,314 (July 21, 1992) 10

61 Fed. Reg. 38,250 (July 23, 1996) 20

70 Fed. Reg. 25,162 (May 12, 2005) 3

70 Fed. Reg. 65,984 (November 1, 2005) 3

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HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, Report 95-295 to Accompany H.R. 6161, 95th Cong. 1st Sess. 133, 397 (May 12, 1977) 26, 28

S. Rep. No. 101-228 (1989), 1990 U.S.C.C.A.N. 3385 25

S. Rep. No. 127, SENATE ENV'T AND PUBLIC WORKS COMM., 95th Cong., 1st Sess. (May 10, 1977) 25

Webster's Third New International Dictionary, p. 742 (1967) 23

INTEREST OF THE AMICI CURIAE*

States have primary responsibility for administering the Clean Air Act's ("CAA"), 42 U.S.C. § 7401 *et seq.*, regulatory programs, including the prevention of significant deterioration ("PSD") program. *See Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 470, 490 (2004). The limits on stationary source emissions established by the CAA's PSD provisions are essential to the States' efforts to limit degradation of air quality: those provisions, fully enforced, provide assurance that industrial facilities will not, by expanding operations and thus emissions, undermine the States' efforts to prevent air quality from deteriorating. Critical to the PSD program's success is EPA's longstanding regulatory position that projects resulting in actual annual increases in pollution by a stationary source trigger PSD requirements. *See* 40 C.F.R. § 51.166(b)(2)(i), (3), (21), (23)(i) (1987).

The Fourth Circuit mandated a contrary test, which would consider only changes in hourly emission rates during operation, and would ignore plant refurbishments that increase emissions by enabling a plant to increase its hours of operation. *See United States v. Duke Energy Corp.*, 411 F.3d 539, 546-48 (4th Cir. 2005). Amici States oppose any such deviation from the current regulations that, contrary to congressional intent, would make the applicability of the PSD requirements turn on paper and pencil exercises which do not provide realistic measures, or even projections, of changes in actual emissions.

Amici States have a strong interest in ensuring the continued vitality of the PSD requirements as a tool for protecting air quality. In particular, several of the Amici States are currently enforcing the PSD regulations against electricity generating

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* All parties have consented to the Commonwealth of Pennsylvania Department of Environmental Protection appearing as amicus on this brief and their consents are being filed herewith. This brief was not authored in whole or in part by counsel for any party. No person or entity other than amici have made a monetary contribution toward the preparation or submission of this brief.

facilities, both within and outside their borders, which have undertaken projects that increase plant utilization and therefore actual emissions without complying with PSD requirements.[1] As Respondent Duke Energy has in this action, the defendants in those actions have sought to evade PSD requirements by claiming that their applicability does not turn on whether a project will in fact result in increased amounts of pollutants in the air, but rather on whether it will increase a plant's maximum emission capacity, a theoretical calculation that bears little connection to real world impacts. It is how much a plant actually runs, not its capacity, that largely determines actual emissions. This Court's conclusions regarding the proper interpretation of the current PSD regulations may be determinative of the outcomes in those state enforcement actions.

If allowed to stand, the Fourth Circuit's decision will substantially reduce the air quality benefits of the PSD program. Older plants, initially constructed without the state-of-the-art controls required by the PSD program, emit harmful pollutants at levels that are ten to twenty times higher than well-controlled plants. When these plants are refurbished in ways that would cause emissions to increase, the PSD provisions provide the States with the choice of capping the plant's allowed emissions, thereby preventing any increased emissions, or requiring the installation of emission controls determined by the States to be the best available control technology ("BACT"). Under the Fourth Circuit's interpretation, however, changes at these plants that substantially increase their actual annual emissions could proceed without any scrutiny by the States of their detrimental impact on ambient air pollution levels.

1. *See, e.g., United States v. Am. Elec. Power Serv. Corp.*, 137 F. Supp. 2d 1060 (S.D. Ohio 2001) (eight states and EPA filed claims concerning eight power plants); *United States v. Cinergy Corp.*, 384 F. Supp. 2d 1272 (S.D. Ind. 2005) (three states and EPA filed claims concerning six power plants), *appeal docketed*, No. 05-8029 (7th Cir. Jan. 18, 2006) (argued on June 2, 2006); *Pennsylvania v. Allegheny Energy Inc.*, 05-cv-885, 2005 U.S. Dist. LEXIS 28894 (W.D. Pa. Nov. 21, 2005) (five states alleging violations at three power plants).

Allowing emissions from these upgraded plants to increase has dire ramifications for the health of residents in the amici States. For example, emissions of sulfur dioxide (SO_2) and nitrogen oxides (NO_x) from older, uncontrolled plants like those at issue in this case lead to the formation of fine particulate matter (soot) and ground level ozone (smog), which kill tens of thousands of Americans annually and sicken hundreds of thousands of others. *See Proposed Rule to Implement the Fine Particle Ambient Air Quality Standards*, 70 Fed. Reg. 65,984, 66,006 col. 3 (EPA Nov. 1, 2005). The same NO_x and SO_2 emissions also cause the acid rain that has killed off the fish in hundreds of lakes in the northeast and other areas of the country, and NO_x emissions contribute to eutrophication of coastal waters – a condition that causes oxygen deficiency in the water, reducing fish diversity and other marine life. *See Clean Air Interstate Rule*, 70 Fed. Reg. 25,162, 25,310-15 (EPA May 12, 2005).[2]

SUMMARY OF ARGUMENT

Congress intended a particular division of labor with respect to interpretation of the CAA and interpretation and application of EPA's implementing regulations. In an enforcement action brought under the CAA, a court must first determine whether EPA's position in the action is supported by applicable regulations interpreting the statute. If the regulations are on point and support the enforcement action, the court's job is done: the court cannot invalidate the regulations based on its conclusion that they constitute an improper interpretation of the statute. By comparison, the D.C. Circuit has exclusive jurisdiction to hear

2. Amici States agree with the arguments made in Petitioners' brief that the Fourth Circuit intruded on the D.C. Circuit's exclusive authority to review final agency actions under 42 U.S.C. § 7607. The CAA's judicial review provisions ensure that the D.C. Circuit Court of Appeals will promptly resolve any questions regarding the validity of nationally applicable EPA regulations before the States undertake the time – and resource – intensive process of adopting State Implementation Plans ("SIPs") to implement them. Amici States here also endorse the arguments made in the brief filed by Amici State of New Jersey *et al.*

a petition to review the validity of EPA's regulations, based on interpretation of the CAA. *See* 42 U.S.C. § 7607(b). As New Jersey and other states explain in their amicus brief, in this enforcement action, the Fourth Circuit's opinion exceeded the jurisdictional limits of § 7607(b).

The Fourth Circuit justified this overreach by a clearly erroneous interpretation of applicable EPA regulations. At issue is the meaning of the term "modification," as used in the CAA's PSD provisions[3] – specifically, whether that term includes projects that, though they do not result in any increase in the *hourly rate* of emissions during operation, will result in increases in the *hours of operation* of a plant. EPA has adopted regulations that directly address this interpretive question; they clearly provide that a project that increases a unit's hours of operation but not its maximum hourly rate of emissions may still be a "modification" for PSD purposes where it will lead to increased annual emissions. The Fourth Circuit, in holding that such a project is not a "modification," mandated use of a distinct test set forth in EPA's regulations governing a different regulatory program, the New Source Performance Standards ("NSPS"). That test ignores any increases in hours of operation and considers only an increase in the maximum hourly rate of emissions during operations. (EPA refers to this test as an "hourly potential emissions" test.) In mandating this test for purposes of the PSD program, the court effectively — and improperly— invalidated EPA's interpretation of the CAA in its PSD regulations, a course only open to the D.C. Circuit.

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3. The PSD provisions of the CAA, 42 U.S.C. §§ 7470-92, cover areas that have already attained the National Ambient Air Quality Standards ("NAAQS"). Although only the PSD requirements are at issue in this case, the Fourth Circuit's decision also applies to areas that have not yet attained the NAAQS, subject to the nonattainment New Source Review ("NNSR") provisions of the CAA, 42 U.S.C. § 7503. The PSD and nonattainment NSR programs are together referred to as the New Source Review ("NSR") Program.

The Fourth Circuit, recognizing that it lacked jurisdiction to invalidate the PSD regulations, protested that its adoption of an hourly potential emissions test was "not an invalidation of those regulations." *Duke*, 411 F.3d at 549 n. 7. In a conclusory analysis that does not address, let alone analyze, the language of the PSD regulations and is relegated to a footnote, the court justified this assertion by holding that those regulations "can" be interpreted consistently with an hourly potential emissions test. *Id.* That conclusion flies in the face of the plain language of the PSD regulations, which, on their face, require an increase in actual annual emissions. Under the regulations, as common sense would suggest, actual annual emissions may increase either because of an increase in the hourly rate of emissions during operation *or* because of an increase in the hours of operation. Moreover, the PSD regulations' focus on actual annual emissions reflected a deliberate decision by EPA, when it revised its PSD regulations, to abandon a potential emissions test virtually identical to the emissions test under the NSPS regulations. In the course of notice-and-comment rulemaking, EPA explicitly concluded that such a potential emissions test should not be used for the PSD program.

Because the plain language of the PSD regulations mandates an actual annual emissions test, thus foreclosing the Fourth Circuit's preferred hourly potential emissions test, the court was required to end its analysis there; no direct analysis of the CAA was necessary. Even if it had been proper, though, for the court to look beyond the plain text of the PSD regulations, EPA's application of the PSD regulations below is consistent with the relevant statutory language and congressional intent. The hourly potential emissions test that the lower court adopted is a test designed to determine whether there will be a change in the emissions that would potentially be emitted if a plant operated at maximum emissions capacity. The test looks only at the theoretical maximum rate of emissions during operation; it ignores hours of operation. But this is contrary to the statutory definition of "modification" under 42 U.S.C. § 7411(a)(4), as

incorporated in the PSD provisions. The CAA is clear that PSD requirements are triggered by physical changes resulting in increases in "actual" emissions of a source, as opposed to "potential" emissions. *See New York v. EPA* ("*New York I*"), 413 F.3d 3, 19-20, 39-40 (D.C. Cir. 2005). Furthermore, in enacting the PSD provisions of the CAA in 1977, Congress clearly expressed its concern with *actual annual* emissions increases, not changes in *hourly potential* emissions.

ARGUMENT

I. The Plain Language Of The PSD Regulations Requires Increases In Actual Annual Emissions, Not Hourly Potential Emissions.

In this EPA enforcement action, the Fourth Circuit has jurisdiction to determine only whether EPA is properly interpreting and applying the applicable PSD regulations. As explained by petitioners, 42 U.S.C. § 7607(b) grants the D.C. Circuit exclusive jurisdiction over any challenge to EPA's interpretation of the CAA in its regulations, and thus the validity of those regulations.[4] Despite this jurisdictional limitation, the Fourth Circuit found the hourly potential emissions test applicable to Duke's projects based on its analysis of the language and legislative history of the CAA and conclusion that Congress had mandated that the emissions tests under the NSPS and PSD regulatory programs *must* be the same. *Duke*, 411 F.3d at 546-51. The court's exercise of jurisdiction to interpret the

4. To the extent that EPA regulations interpreting the CAA "could have been" challenged in the D.C. Circuit, such regulations "shall not be subject to judicial review in civil or criminal proceedings for enforcement." 42 U.S.C. § 7607(b)(2); *see also Wis. Elec. Power Co. v. Reilly* ("*WEPCo*"), 893 F.2d 901, 914, n. 6 (7th Cir. 1990) (review limited by § 7607(b)(1) to "whether the EPA properly applied [the] regulations" at issue); *United States v. Ethyl Corp.*, 761 F.2d 1153, 1157 (5th Cir. 1985) ("section 307(b)'s clear language and Congress's manifest intent [was] to avoid protracted and inconsistent adjudications over the validity" of nationally applicable CAA regulations), *cert. denied*, 474 U.S. 1070 (1986).

CAA was premised on its assumption that the PSD regulations "can" be interpreted to institute a test based solely on hourly potential emissions. Based on that premise, the court concluded that its decision was "not an invalidation of those regulations." *Id.* at 548 n. 7.

In support of this critical determination that the PSD regulations can be interpreted to direct an hourly potential emissions test, the Fourth Circuit conducted no analysis of the language of those regulations or the history of their adoption. An evaluation of these issues demonstrates that the court's interpretation cannot stand, and that EPA's interpretation and application of its regulations is correct.

A. The PSD Regulatory Emissions Test Cannot Be Interpreted As An Hourly Potential Emissions Test.

The enforcement action in *United States v. Ohio Edison, Co.*, 278 F. Supp. 2d 829 (S.D. Ohio 2003), provides a vivid illustration of how a power plant project that increases hours of operation may substantially increase the plant's actual annual emissions, even if the project does not increase its hourly emissions capability. The defendant in that case undertook boiler component replacements – similar to those at issue below – to increase the hours of operation of the units. *Id.* at 858. Persistent boiler tube leaks at one such unit caused it to be shut-down a total of 2,134 hours per year. The court found that replacing the failed boiler components triggered PSD permitting requirements because the increased hours of operation projected by the defendant to result from the replacement would yield 5,200 tons per year of increased SO_2 emissions, *id.* at 869-70,[5] which is

5. Similarly, the D.C. Circuit, using the facts in *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292 (1st Cir. 1989), has aptly illustrated this point:

> In that case, a factory sought to . . . replace old cement kilns that operated 60% of the time with a new kiln that would emit fewer pollutants per hour. . . . Under the

(Cont'd)

well above the 40 ton per year emissions increase threshold, *see* 40 C.F.R. § 51.166(b)(23)(i). The boiler component replacements at issue here, like those in *Ohio Edison*, were intended to increase the future hours of operation of the plants without increasing their hourly emission rate, *Duke*, 411 F.3d at 544, resulting in projected increases of actual annual emissions. As explained below, the PSD regulations clearly reach such increases.

1. Unlike the NSPS Regulations, the 1980 PSD Regulations Require Emissions Increases to Be Based on Changes in Actual Annual Emissions.

As other courts have correctly held, the plain language of the 1980 regulations, as well as the context in which they were adopted, directly contradicts the Fourth Circuit's determination that the PSD regulations can and must be "interpreted" to require an hourly potential test. First, the PSD regulations, by their plain language, require a finding of an increase in actual annual emissions, whether because of an increase in hours of operation or because of an increase in the hourly rate of emissions during operation. The PSD pre-construction requirements apply, *inter alia*, to "any major modification" which, in turn, is defined as a physical change that "would result in a significant net emissions increase. . . ." 40 C.F.R. § 51.166(b)(2)(i), (i)(2), (j)(3). The definition of "net emissions increase" denotes the positive sum of any increase in "actual emissions" at the unit resulting from the physical or operational change and any other

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(Cont'd)

> interpretation urged by industry petitioners, . . . the company had not undergone an 'increase' in emissions – and thus would not trigger NSR – since the kiln would have a lower hourly emissions rate than the old ones. Siding with EPA, the First Circuit agreed that the company had to obtain an NSR permit to make the intended change [because of the projected increase in annual emissions resulting from the change].

New York I, 413 F.3d at 15.

contemporaneous decreases or increases in "actual emissions" at other units within the source. *Id.* § 51.166(b)(3). The regulations make clear that actual emissions are measured on an *annual*, not *hourly*, basis. For the pre-change baseline period, the regulations define "actual emissions" to mean "the average rate, *in tons per year*, at which the unit *actually emitted* the pollutant." *Id.* § 51.166(b)(21)(ii) (emphasis added). Likewise, the calculation of post-change emissions is also based on "the actual rate of emissions from the unit."[6] *Id.* § 51.166(b)(21)(i). If the net emissions increase is positive, the next step is to determine if the emissions increase is "significant," defined under the regulations as "a rate of emissions that would equal or exceed" different thresholds of pollutant emissions, once again measured in "tons per year." *Id.* § 51.166(b)(23)(i).

The language of the PSD regulations contrasts starkly with the language of the NSPS regulations. The NSPS emissions test does not measure either actual *or* annual emissions increases. The regulatory term "modification," which triggers the NSPS requirements, is defined in terms of an increase in an "emission rate," *id.* § 60.14(a), measured in kilograms of pollutant emitted per hour at maximum unit capacity, as specified in § 60.14(b)(2).[7] The NSPS emissions test is thus a paper and

6. Under 40 C.F.R. § 51.166(b)(21)(iv) (1987), "[f]or any emissions unit which has not begun normal source operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date." Thus conversely, where the unit *has* begun normal operations at the time of the physical or operational change, the unit's potential to emit *cannot* be used. *See* 56 Fed. Reg. 27,630, 27,633/1 (June 14, 1991) ("linchpin . . . for predicting future emissions after a modification is thus whether the unit has 'begun normal operations'"). Under these circumstances, § 51.166(b)(21)(i) (1987) – which defines "actual emissions" – is applicable. *See WEPCo*, 893 F.2d at 917 (finding post-change emissions for unit that *has* begun normal operations based on "realistic assessment of [a change's] impact on ambient air quality levels") (internal quotation marks omitted).

7. This brief references the 1975 NSPS regulations, which first employed the hourly potential emissions test.

pencil exercise that computes changes in hypothetical hourly emissions at maximum unit capacity – *regardless* of whether the unit was ever actually operated at that capacity, with both the historical and projected utilization of the unit irrelevant. Accordingly, EPA has consistently described the NSPS emissions test as a calculation of changes in *hourly potential* emissions: "[P]ursuant to longstanding EPA interpretations, the emission rate before and after a physical change is evaluated at each unit by comparing the *hourly potential* emissions under current maximum capacity to emissions at maximum capacity after the change." Joint Appendix ("J.A.") 259 (Applicability of PSD and NSPS Requirements to WEPCO Life Extension Project, Sept. 9, 1988, p. 9) (emphasis added); *see also WEPCo*, 893 F.2d at 913 ("EPA compares the *hourly emissions* of the unit at its current maximum capacity to its *potential* emissions at maximum capacity after the change" (emphasis added)); *Requirements for Preparation, Adoption and Submittal of Implementation Plans*, 57 Fed. Reg. 32,314, 32,330/2 (EPA July 21, 1992) ("Under current regulations, the emissions rate before and after a physical or operational change is evaluated at each unit by comparing the current hourly potential emissions at maximum operating capacity to hourly emissions at maximum capacity after the change.").[8]

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8. Even the regulated industry understood that a modification can occur under the PSD regulations absent an increase in hourly emissions capacity. In their original challenge to the 1980 PSD regulations, industry petitioners interpreted the regulations in the same manner as EPA does here, stating that (i) the regulations "provide that a modification occurs whenever a series of contemporaneous changes at a source result in a significant increase in *actual* emissions, even though the source's net *capacity* to emit remains constant or declines," and (ii) the "question of whether there is a net increase in actual emissions requires that variations in the source's hours and rates of operation be taken into account." *See* Brief for Industry Petitioners at 5-6, 28-29, *Chem. Mfrs. Ass'n v. EPA*, No. 79-1112 (D.C. Circ. Feb. 12, 1981); *New York I*, 413 F.3d at 14-15 (original challenge to 1980 PSD

(Cont'd)

Second, the Fourth Circuit's assumption that the NSPS and PSD regulatory emissions tests "can" be read identically disregards the circumstances of EPA's adoption of the actual annual emissions test under the 1980 PSD regulations, demonstrating that EPA intended and understood the PSD test to be different from the NSPS hourly potential test. Significantly, when EPA adopted the actual annual emissions test, it abandoned a capacity-based test, similar to the NSPS emissions test, that it had used in an earlier version of the PSD program in effect between 1978-80. Unlike the 1980 regulations at issue here, the 1978 PSD regulations defined "major modification" as any physical or operational change "which increases the *potential emission rate* of any air pollutant regulated under the act" by either 100 or 250 tons per year (depending on source category). 43 Fed. Reg. 26,380, 26,403-04 (June 19, 1978) (emphasis added).[9] EPA defined "potential to emit" in the 1978 regulations as "the *capability at maximum capacity* to emit a pollutant in

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regulations stayed); *see also* Settlement Agreement, Ex. B at 1, *Chemical Mfrs. Ass'n v. EPA*, No. 79-1112 (D.C. Cir. Feb. 22, 1982) (settlement between industrial polluters, including Duke, and EPA, requiring EPA to propose changing PSD emissions test to allow emissions increases to be based on "source's potential to emit (as calculated in terms of pounds of pollutant emitted per hour)").

9. EPA interpreted "modification" in its 1974 PSD regulations to be "consistent with" the NSPS regulatory definition of that term. 39 Fed. Reg. 42,510, 42,513/1 (Dec. 5, 1974) (interpreting 40 C.F.R. § 52.01(d)). The NSPS definition in effect at that time, however, applied simply to "increases [in] the amount of any air pollutant," with *no* reference to hourly emission rates. 36 Fed. Reg. 15,704, 15,705/1 (Aug. 17, 1971); *Duke*, 411 F.3d at 542. The 1974 PSD regulatory definition of "modification" was subsequently superseded and made moot by the PSD emissions test adopted by EPA in 1978 to administer the 1977 CAA amendments. *Ala. Power Co. v. Costle*, 636 F.2d 323, 348 n. 24 (D.C. Cir. 1979); *see also Envtl. Defense Fund, Inc. v. EPA*, 898 F.2d 183, 184 n. 1 (D.C. Cir. 1990) (explaining history of PSD regulations' promulgation).

the absence of air pollution control equipment." *Id.* at 26,404/1 (emphasis added). In *Alabama Power*, however, the D.C. Circuit vacated that definition of "major modification" under the 1978 PSD regulations, 636 F.2d at 399-400, finding that the related PSD statutory definition of "major emitting facility" under 42 U.S.C. § 7479(1) requires the measurement of emissions to be based on "some measure of actual emissions." *Id.* at 353.

EPA promulgated the 1980 regulations "[i]n response to" *Alabama Power*. 45 Fed. Reg. 52,676/1 (Aug. 7, 1980). EPA re-examined the statutory definition of "modification" incorporated into the PSD provisions, finding that the words "'the *amount* of any air pollutant *emitted* by such source or which results in *the emissions* of any air pollutant not previously *emitted*'... appear to refer to what the source is actually emitting at a particular time." *Id.* at 52,700/2; *see also New York I*, 413 F.3d at 40 (EPA in "the preamble of the 1980 rule" interpreted § 7411(a)(4) to require that emissions increases be based on actual emissions). EPA also found *Alabama Power*'s discussion of the meaning of "major emitting facility" controlling in this respect, noting that the Court "used language which, like the section 111(a)(4) definition, suggest changes in actual emissions." 45 Fed. Reg. at 52,700/2. Thus, "[f]ollowing the lead" of *Alabama Power*, EPA "shifted the focus of its regulatory definitions from" a capacity-based, potential emissions test, similar to the test the Fourth Circuit decision requires, to the test based on actual annual emissions that is now reflected in the plain language of the PSD regulations. *Id.* at 52,700/3. Because, for purposes of the PSD program, EPA explicitly rejected a potential emissions test like the one used for the NSPS program in favor of an actual annual emissions approach, the PSD regulations cannot be interpreted to provide for an hourly potential test. *Cf. County of Los Angeles v. Shalala*, 192 F.3d 1005, 1014 n. 2 (D.C. Cir. 1999) ("adding and deleting certain words" gives amended provision "different meaning from its predecessor provision"), *cert. denied*, 530 U.S. 1204 (2000); *DIRECTV, Inc. v. Brown*, 371 F.3d 814, 817 (11th Cir. 2004)

("[w]here the words of a later statute differ from those of a previous one on the same or related subject, then Congress must have intended them to have a different meaning" (quoting *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444 (D.C. Cir. 1988))).

Accordingly, the Fourth Circuit stands alone as the only circuit court to find that the NSPS and PSD emissions tests must or even can be interpreted identically. In *New York I*, Duke and other industry petitioners argued that "the 1980 regulation provided that an emissions 'increase' occurs only if the maximum hourly emissions rate goes up as a result of the physical or operational change." 413 F.3d at 15. Noting that Duke's test could only be instituted if the existing PSD regulations were invalidated, the D.C. Circuit rejected industry's contention that EPA must and can interpret the 1980 PSD regulations so that only a project that increases a plant's hourly emissions at maximum unit capacity constitutes a modification. *See id.* at 19-20.[10] *See also New York v. EPA* ("*New York II*"), 443 F.3d 880, 889 (D.C. Cir. 2006) (rejecting industry's "rel[iance] on NSPS regime to reargue their position that 'modifications' [under PSD] require an increase in maximum emission rates"); *WEPCo*, 893 F.2d at 913, 915 (finding that NSPS and PSD regulations "measure[] emissions in a fundamentally distinct manner," with the NSPS test "concerned primarily with . . . emissions rates, expressed in kilograms per hour," and the PSD test "concerned with changes in total annual emissions, expressed in tons per year"); *Puerto Rican Cement*, 889 F.2d at 298 (PSD requirements triggered by change allowing plant to operate more hours even though hourly emissions

10. The D.C. Circuit's decision carries special weight in these matters because it has exclusive jurisdiction to review EPA's "nationally applicable" air pollution regulations. 42 U.S.C. § 7607(b)(1). Moreover, no party has petitioned this Court for certiorari in *New York I*, meaning that the validity of the emissions test under the 1980 PSD regulations can no longer be questioned.

remain unchanged or reduced).[11] The other circuits have correctly interpreted the PSD regulations.

2. The Fourth Circuit's Conclusion that the NSPS and PSD Regulations Regarding Modifications Must Be Interpreted Identically Ignores Numerous Differences Between the Two Regulatory Programs.

Any attempt to read the NSPS and PSD regulations as consistent would require papering over of numerous obvious differences between the two programs. One important difference between the two emissions tests, for example, is that the PSD test allows netting (or "bubbling") of emissions increases and decreases across units within a source in determining whether the modification requirements are triggered, while the NSPS test does not allow such netting. *Compare* 40 C.F.R. § 51.166(b)(2)(i), (3) ("major modification" defined in terms of change resulting in "net emissions increase"), *with id.* § 60.14(a) ("modification" defined in terms of change resulting in "increase in the emission rate" at unit only). As explained in *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 840, 860 (1984) (in nonattainment New Source Review, or "NNSR," context) and *Alabama Power*, 636 F.2d at 400-401 (in PSD context), EPA based these divergent approaches on different interpretations of the single statutory definition of "stationary source," under 42 U.S.C. § 7411(a)(3), which is a component term of the statutory definition of "modification," *id* § 7411(a)(4) ("term 'modification' means any physical change in . . . a *stationary source* which increases the amount of any air

11. In *Puerto Rican Cement*, EPA compared " the *actual* historical amount of pollutants that Kilns 3 and 6 emitted . . . with the amount of pollutants that the [single] converted kiln would be *capable* of emitting in the future." 889 F.2d at 296 (emphasis added). The First Circuit upheld EPA's application of the actual-to-potential emissions test there based on its finding that the converted kiln at issue constituted a "new" emissions unit that had *not* begun normal operations. *Id.* at 292, 296-97; *see also WEPCo*, 893 F.2d at 917 n.12 (distinguishing *Puerto Rican Cement* on this basis).

pollutant emitted by such source . . .") (emphasis added). EPA applied these different interpretations of "stationary source" to distinguish "between the technology-based provisions of NSPS and the air quality-based provisions of [PSD]." *See* 57 Fed. Reg. at 32,316/1.

At the time the PSD regulations at issue here were adopted in 1980, there were at least three other key differences between the two programs: (1) While the PSD regulations require examination of a representative two-year period in determining how the emissions baseline is measured, the NSPS baseline is based on the maximum achievable emission rate immediately preceding the change; (2) While the PSD emissions test requires an increase above an annual "significan[ce]" threshold, NSPS requirements are triggered by any increase in maximum achievable emissions; and (3) The NSPS, but not PSD, regulations exempt pollution control projects from the modification requirements.[12] *See* 40 C.F.R. § 51.166(b)(2)(i), (21)(ii), (23); 40 C.F.R. § 60.14(e)(5), (h); *WEPCo*, 893 F.2d at 914-15.

Additionally, the Fourth Circuit finding that EPA can and must adopt identical NSPS and PSD definitions of "modification" is both flatly inconsistent with and unworkable in light of the decisions of this Court in *Chevron* and the D.C. Circuit in *Alabama Power*, both of which approve an approach to modifications under NNSR and PSD that differs from that used in the NSPS program. Those decisions upheld EPA's interpretation of "stationary source" to allow for netting in determining whether a source has been modified under NSR but not under NSPS. *See Chevron*, 467 U.S. at 863-64 (allowing netting in determining what is a modification under NNSR programs, stating that "agency primarily responsible for administering this important legislation has consistently interpreted it flexibly – not in a sterile textual vacuum, but in

12. EPA's pollution control project exclusion in the 2002 PSD rule changes was vacated by the D.C. Circuit as being beyond EPA's authority. *New York I*, 413 F.3d at 40-42.

the context of implementing policy decisions in a technical and complex arena"); *Alabama Power*, 636 F.2d at 402 ("bubble concept would be contrary to the intent of the NSPS provisions, but such is clearly not the case with regard to the PSD provisions"); *see also ASARCO Inc. v. EPA*, 578 F.2d 319 (D.C. Cir. 1978) (prohibiting netting under NSPS program). Indeed, the holding in *Alabama Power* was also based on "two possible ways to construe the term 'increases'" – one of the component terms of § 7411(a)(4) at issue here; one that allows for netting and one that does not. 636 F.2d at 401.[13]

Thus, under *Chevron*, a power plant unit is not considered to be modified under PSD and NNSR if actual annual emission increases resulting from a physical change at the unit are offset by emission decreases elsewhere at the plant, but the same unit may still be considered modified under NSPS (where netting is unavailable) if the unit increases its potential-to-emit. While *Chevron* and *Alabama Power* authorize EPA to interpret "modification" to allow for netting under PSD but not NSPS to implement the different purposes of the programs, the Fourth Circuit's decision now requires EPA to interpret "modification" identically under the two programs. The Fourth Circuit's holding directly conflicts with the holdings in *Chevron* and *Alabama Power*.

B. The Other Arguments Relied Upon By the Fourth Circuit are Erroneous.

The Fourth Circuit failed to explain how the PSD regulations could be construed identically with the NSPS regulations, despite the clear differences between them. Instead, relegating its entire analysis of the meaning of the regulations to a partial sentence in a footnote, the Fourth Circuit explained that "the PSD regulations can be interpreted consistently with

13. Of course, as discussed *infra*, pp. 22-24, as used in the PSD context, the phrase "increases the amount of any air pollutant emitted by such source," § 7411(a)(4), must be interpreted as requiring "actual," as opposed to "potential," emission increases.

pre-existing principles – the NSPS regulations – as the district court demonstrated and as EPA's Director of the Division of Stationary Source Enforcement twice opined shortly after promulgation of the PSD regulations." *See* 411 F.3d at 549 n. 7. However, the arguments set forth in the district court's decision provide no basis for this construction of the PSD regulation.

First, the notion that Congress incorporated the NSPS regulatory definition of "modification" into the PSD provisions when it amended the CAA in 1977, *see United States v. Duke Energy Corp.*, 278 F. Supp.2d 619, 629 (M.D.N.C. 2003), is erroneous. This issue bears on the validity of the 1980 PSD regulations, not their interpretation, and thus under 42 U.S.C. § 7607(b)(2) could only have been, and indeed was, raised in the D.C. Circuit in *New York I*. Moreover, as the D.C. Circuit correctly found in *New York I*, there are no "indications in the statutory language or history to infer that Congress intended to incorporate" the NSPS regulatory definition of "modification" into the PSD provisions. 413 F.3d at 19-20; *see also Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) ("administrative interpretation of statute" not incorporated into reenacted statute where "[t]here is no indication that Congress was aware of administrative construction"); *cf. Bragdon v. Abbott*, 524 U.S. 624, 632 (1998) (finding statutory incorporation of regulation where Congress "adopted a specific statutory provision" that expressly adopted an existing regulatory provision); *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 437 (1986) (finding FDIC regulation defining statutory term "deposit" incorporated into reenacted statute where regulation had been in existence for 50 years and Congress had "expressly designed to incorporate the FDIC's rules and regulations on 'deposits'").

Second, the exemption for increases in hours of operation from what constitutes a physical change, 40 C.F.R. § 51.166(b)(2)(iii)(f), in no way precludes EPA from considering increases in hours of operation in calculating emissions increases attributable to a physical change. *See Duke*, 278 F. Supp.2d at 641. By its terms, § 51.166(b)(2)(iii)(f) only precludes EPA from

finding that an "increase in the hours of operation" alone constitutes a physical change; it has no application, however, to situations where – as in this case – there is a physical change such as a power plant renovation that enables a source to operate more hours. As explained in *WEPCo*, EPA recognized in the preamble to the 1980 PSD rules that the "hours of operation" exemption was "provided to allow facilities to take advantage of fluctuating market conditions, not construction or modification activity." 893 F.2d at 916 n. 11 (citing 45 Fed. Reg. at 52,704/2). Thus, EPA's contemporaneous interpretation of the "hours of operation" exemption is that, while an increase in such hours by itself does not constitute a "modification," the exemption does not apply to actual construction that allows a source to increase its hours of operation. Accordingly, *WEPCo* found that "EPA's refusal to apply '[this] production rate/hours of operation' exclusion was proper" because the exclusion did not cover the "modification" activity at issue in the case.[14] *Id.*; *see also Puerto Rican Cement*, 889 F.2d at 298 ("hours of operation" exemption inapplicable to determining emission increase attributable to physical change).

Third, the statements of a single agency employee made in a letter to an industry source and in an internal memorandum cannot support an interpretation of the PSD regulation as requiring application of the NSPS-hourly emissions test. *See* 411 F.3d at 549 n. 7; *see also Duke*, 278 F. Supp.2d at 641.[15]

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14. *WEPCo* does not require PSD emissions increases to be based on changes in "the maximum hourly rate of emissions." *Cf.* 278 F. Supp.2d at 644-45. *WEPCo* holds that the NSPS and PSD programs "measure[] emissions in a fundamentally distinct manner" and that EPA may consider increased hours of operation in determining whether a physical change will increase emissions, *see* 893 F.2d at 913, 916 n. 11.

15. It is far from clear that the documents cited by the district court, and thus implicitly relied upon by the Fourth Circuit, actually support this proposition. For example, the district court misconstrued a January 22, 1981 memorandum for a finding that "increased hours of

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This conclusion is flatly inconsistent with the regulations' plain language, EPA's express abandonment of a potential emissions test in the 1980 regulations, and EPA's contemporaneous interpretation as set forth in the regulatory preamble. *See Cinergy*, 384 F. Supp.2d at 1278 (memoranda "are contrary to the plain language of the CAA and EPA's regulations"); *Ohio Edison*, 276 F. Supp.2d at 877 (reliance on memoranda "is misplaced because they are contrary to the plain language of [CAA]"); *cf. Puerto Rican Cement*, 889 F.2d at 298 (rejecting similar argument where "EPA materials written both before, and after, the deviant letter are consistent with [EPA's] present interpretation").

Reliance on these memoranda is also contrary to EPA's consistent interpretation of the 1980 PSD regulations as requiring an actual annual emissions test that considers increases in hours of operation attributable to a physical change. Indeed, as discussed *supra* at 10-11 n. 8, at the time the two documents were written, EPA was defending against an industry lawsuit, challenging the regulations on the grounds that they *did not* include a maximum hourly rate test and had entered into a settlement agreement requiring it to propose changing the PSD

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operation, even when coupled with a physical or operational change, would not be considered a modification." *Duke*, 278 F. Supp.2d at 641-42. The actual memorandum, however, considered whether a plant converting to a new fuel must undergo PSD permitting, with EPA's determination that the "fuel switch" was exempt from being a "physical change" under 40 C.F.R. § 51.166(b)(2)(iii)(e). *See Ohio Edison*, 276 F. Supp.2d at 877. Thus, as the court in *Ohio Edison* explained, absent a physical change, the source was allowed to increase hours of operation without triggering PSD requirements. *Id.* Additionally, the court recited a June 24, 1981 applicability letter as follows: "'PSD applicability . . . is determined by evaluating any change in the [hourly] emissions rates caused by' the physical or operational change being examined." *Duke*, 278 F. Supp.2d at 641. Notably, the word "hourly" is not in the text (*see* JA28), and the specified emission rate can alternatively refer to the annual rate required under PSD.

rules back to the pre-1980 approach. *See also* J.A. 255 (Applicability of PSD to the WEPCO Life Extension Project, Sept. 9, 1988, p. 6 ("exclusion for increases in hours of operation . . . does not take the project beyond the reach of PSD coverage if those increases do not stand alone but rather are associated with non-excluded physical or operational changes")); Letter from EPA to Ohio Edison (Jan. 1990) ("post-demonstration emissions increase attributable solely to an increase in the hours of operation . . . of the unit" does not trigger PSD "to extent that the emissions increase did not result from a physical or operation change"), *quoted in Ohio Edison*, 276 F. Supp.2d at 876; 57 Fed. Reg. at 32,328/1 ("increase in emissions attributable to an increase in hours of operation or production rate which is the result of a construction-related activity is not excluded from review"); 61 Fed. Reg. 38, 250, 38,269/2 (July 23, 1996) (expressing concern with industry request to *change* test to one based on increases in hourly emissions as allowing source "owner to use the [operating unit] at much higher levels (*e.g.*, more hours per day or week) than it had in the past" and thus "increase . . . utilization even though hourly potential emissions remain the same.").

Moreover, as a matter of law, a single agency official cannot change the plain meaning and EPA's contemporaneous interpretation of the 1980 PSD regulations absent notice-and-comment rulemaking required to make such a change. *See Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997) ("Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking."), *cert. denied sub nom.*, *Pollin v. Paralyzed Veterans of Am.*, 523 U.S. 1003 (1998). The States are in charge of implementing the PSD program through their SIPs and rely in this regard on the language of EPA's regulations and official agency statements made in rulemaking documents; they simply cannot be bound by a "secret" agency "law" memorialized in a letter to a single industry source or in

an EPA internal memorandum. *See Train v. NRDC*, 421 U.S. 60, 87 (1975) (deferring to EPA's official interpretation of statute where "there has undoubtedly been reliance upon its interpretation by the States").

Finally, there are post-1992 claims at issue in this case and no analysis that the Fourth Circuit has relied upon can establish that the applicable 1992 PSD regulations direct an hourly potential emissions test. There is simply no way that anyone could have come away from EPA's 1992 rulemaking proceeding believing that the PSD and NSPS emissions tests could be interpreted identically. EPA reiterated in the regulatory preamble that, with respect to determining emissions increases, (i) "the applicable [NSPS and PSD] rules branch apart," with "[e]missions increases for NSPS purposes . . . determined by changes in the hourly emissions rates at maximum physical capacity" and emissions increases under PSD determined by changes in "total emissions to the atmosphere . . . expressed in tons per year," and (ii) "an increase in emissions attributable to an increase in hours of operation or production rate which is the result of a construction-related activity is not excluded from review (see *WEPCo*, 893 F.2d at 916 n. 11; *Puerto Rican Cement*, 889 F.2d at 298)." 57 Fed. Reg. at 32,316/1, 32,328/1. EPA also specified that power plant operators are required to consider increases in utilization in performing an emissions increase analysis. *See* 40 C.F.R. § 51.166(b)(33) ("representative actual annual emissions" defined as "average rate, in tons per year, at which the source is projected to emit a pollutant . . ., considering the effect any such change will have on increasing or decreasing the hourly emissions rate and *on projected capacity utilization*" (emphasis added)).[16]

16. The district court found erroneously that Duke "opted out" of the 1992 regulatory requirements "by failing to satisfy the regulatory prerequisite of submitting emissions data for a five-year period following the physical change." *Duke*, 278 F. Supp.2d at 647 n. 25. There is no provision in the regulations that allows Duke or any other utility to

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In sum, the Fourth Circuit ruling is inconsistent with the plain language of the 1980 PSD regulations, the context in which they were promulgated, including the EPA's contemporaneous interpretation, and EPA's consistent interpretation of the regulations for the last 26 years.

II. The PSD Regulations Requiring Emission Increases To Be Based On Changes In Actual Annual Emissions Effectuate Congressional Intent.

Contrary to the Fourth Circuit's erroneous conclusion, 411 F.3d at 548-51, the statutory language and legislative history of the CAA establish that the PSD regulatory emissions test correctly implements the plain language of the PSD provisions.

A. The Statutory Definition of "Modification" Requires Actual Emissions Increases.

The actual annual emissions test under the PSD regulations follows directly from the plain language of the statutory definition of modification as applied in the PSD context. Congress defined "modification" in the 1970 CAA amendments as:

> [A]ny physical change in, or change in the method of operation of, a stationary source *which increases the amount of any air pollutant emitted* by such source or which results in the emission of any air pollutant not previously emitted.

42 U.S.C. § 7411(a)(4) (emphasis added).

In *New York I*, the D.C. Circuit employed "traditional tools of statutory interpretation" in correctly finding "that the CAA unambiguously defines 'increases' [under § 7411(a)(4)] in terms

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opt out of regulatory requirements. Instead, as specified under § 51.166(b)(21)(iv) and (v), EPA may assume that a source owner that fails to meet the emissions record-keeping requirement of § 51.166(b)(33) was emitting at maximum capacity following the change. Despite this, EPA is applying the more lenient actual-to-projected-actual test in this case.

of 'actual emissions'" – not "potential" or "allowable" emissions. 413 F.3d at 39.[17] The court's ruling gave effect to the plain meaning of the term "emitted," which, without a modifying phrase such as "potentially," refers to pollution that a source has actually generated. *See* Webster's Third New International Dictionary 742 (3d ed. 1967) (defining "emit" as, *inter alia*, to "send out: discharge, release"). Similarly, the term "amount," as used in the statutory definition of modification, signifies Congress's concern with the actual quantity of pollutants emitted rather than with the source's emissions "rate" or "potential." *See New York I*, 413 F.3d at 40 ("phrase 'the *amount* of any air pollutant *emitted* by [the] source' plainly refers to actual emissions"). Thus, analysis of the ordinary meaning of these terms demonstrates that "increases [in] the amount of any air pollutant emitted" means increases in the actual emissions of the source, not some theoretical measure of changes in plant capacity.

This interpretation of the statutory definition of "modification" is compelling when examined in the context of the PSD provisions of the CAA considered as a whole. Indeed, the other uses of the terms "emitted" and "emission" in the latter part of the definition of "modification" also refer to actual emissions: ". . . or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411(a)(4). This language would make no sense if "emitted" and "emission" referred to potential emissions; by using the term "previously" to characterize "emitted," Congress clearly was referring to actual emissions. Moreover, it is unlikely that Congress could have intended the single word "emitted" to have different meanings within the same sentence.

17. Applying this interpretation, the court vacated an exemption based on "clean unit" status under the 2002 NSR regulatory changes. This exemption would have allowed sources that installed pollution controls or instituted certain work practices to avoid PSD permitting for 10 years, even if the source undertook a physical change that significantly increased actual emissions during that time period. 413 F.3d at 38-40.

That Congress meant the term "emit" to refer to actual emissions is also demonstrated by Congress's "juxtaposition of the terms 'emit' and 'potential to emit,'" as part of the definition of "major emitting facility," 42 U.S.C. § 7479(1), which "indicates that when Congress enacted the NSR program in 1977, it was conscious of the distinction between actual and potential emissions." *New York I*, 413 F.3d at 39; *see also Alabama Power*, 636 F.2d at 353 (holding that the term "emit" in the definition of "major emitting facility," 42 U.S.C. § 7479(1), refers to "some measure of actual emissions" rather than potential emissions). Likewise, the juxtaposition of the terms "emission limitation" and "emitted" in the context of the definition of "best available control technology" under 42 U.S.C. § 7479(3), shows that Congress understood the difference between those terms, with the latter referring exclusively to "actual" emissions. *New York I*, 413 F.3d at 39. As the D.C. Circuit explained, "[i]f Congress had intended for 'increases' in emissions to be measured in terms of potential or allowable emissions, it would have added a reference to 'potential to emit' or 'emission limitations.' The absence of such a reference must be given effect." *Id.* at 40; *see also Alabama Power*, 636 F.2d at 354, 355 (legislative history of the 1977 CAA amendments indicates that "Congress was concerned with large industrial [] major *actual* emitters of air pollution" and "that only major sources of *actual* emissions would be covered by the PSD permit requirements" (emphasis added)).

Thus, the common understanding of "emitted" and Congress's use of that term under other PSD provisions supports an actual emissions test. Accordingly, the D.C. Circuit's reading of § 7411(a)(4) in *New York I*, requiring changes in "actual" emissions as the event that triggers modification, is the only natural reading of the statutory definition of "modification" in the context of the PSD provisions. *See Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004); *Bluewater Network v. EPA*, 370 F.3d 1, 13 (D.C. Cir. 2004).

B. The Actual Annual Emissions Test Under the PSD Regulations Furthers Congressional Emphasis on Actual Air Quality.

The actual annual emissions test under the PSD and NNSR regulations also plays an integral role in furthering Congressional intent to achieve and maintain levels of air quality that protect public health and welfare. *See, e.g.*, 42 U.S.C. § 7470(1). Prior to 1977, many areas of the country were failing to attain the NAAQS; for example, 78 areas still were not in compliance with the ozone standard. S. Rep. No. 101-228, at 10 (1989), *as reprinted in* 1990 U.S.C.C.A.N. 3385, 3396; *see also id.* at 11, *as reprinted in* 1990 U.S.C.C.A.N. at 3397 (even as of 1989, 150 million people were living in areas failing to meet NAAQS for one or more pollutants). As with later failures to meet CAA deadlines, the "paper demonstrations of attainment" in some SIPs bore "little relation to the likelihood of actual attainment" and, in conjunction with the NSPS and mobile source emissions controls required under the 1970 CAA amendments, failed to translate into sufficient emissions reductions to achieve attainment. *Id.*, *as reprinted in* 1990 U.S.C.C.A.N. at 3397. Congress intended the 1977 amendments, which included the NSR provisions, to address the insufficient progress being made toward clean air. *See, e.g.*, SENATE ENV'T AND PUBLIC WORKS COMM., S. Rep. No. 95-127, at 12 (May 10, 1977) ("several thousand major industrial sources will not meet the deadlines of the act").

The NSR provisions added in 1977 reflect Congress's focus on actual air quality. In particular, the NSR provisions are concerned with maintaining (in the case of PSD) and improving (in the case of NNSR) actual air quality in areas where new or modified plants are located. The PSD provisions thus require a new or modified source to obtain a pre-construction permit, demonstrating that it will not cause a violation of an air quality "increment" (designed to prevent air quality from deteriorating significantly), as well as to install emission controls that represent BACT. 42 U.S.C. § 7475. The NNSR provisions

require a new or modified source to obtain a pre-construction permit, obtain emissions offsets so that total "actual" emissions in the nonattainment area are reduced when the source begins operation, and comply with the Lowest Achievable Emission Rate (LAER). *Id.* § 7503.[18] EPA's determination under NSR to treat actual annual emission increases as the triggering mechanism for "modifications" thus promotes Congressional intent to focus on protecting and improving actual air quality.

One of Congress's primary mechanisms for ensuring continued industrial development without harming air quality is the increment consumption analysis a new or modified source must undertake before obtaining a PSD permit. A new or modified source's emissions violate a region's "increment" if its projected pollutant emissions, when added to emissions increases and decreases at other sources in the same area, will exceed "maximum allowable" pollution above a "baseline concentration" level. *See id.* §§ 7473, 7475(a)(3)(A); 45 Fed. Reg. at 52,718/1-2. This analysis is based on the measurement of "actual" air quality conditions. The D.C. Circuit in *Alabama Power* found that the statutory definition of "baseline concentration," 42 U.S.C. § 7479(4), requires the measurement of "*actual* ambient pollution levels existing at the time of the first [PSD] permit application." 636 F.2d at 376 (emphasis added); *see also id.* ("baseline is to include all emissions *actually* being made by major facilities") (emphasis added).[19] Consistent with the statutory language, EPA decided in its 1980 PSD

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18. Non-attainment SIPs must include "a comprehensive, accurate, current inventory of *actual* emissions from all sources." 42 U.S.C. § 7502(c)(3) (emphasis added).

19. An earlier version of the House Bill premised the calculation of the "baseline concentration" of pollutants on "plant capacity in existence." HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, Report 95-295, at 397 (to accompany H.R. 6161, 95th Cong. 1st Sess. 397) (May 12, 1977). However, as noted in *Alabama Power*, the House Bill's reference to plant capacity was deleted from the enacted version of the 1977 CAA amendments. *See* 636 F.2d at 380-81.

regulations to use "actual source emissions" in determining the baseline concentration in order to "reflect actual air quality in an area." 45 Fed. Reg. at 52,714/2-3, 52,718/1.

In adopting the 1980 regulations, EPA followed the same "actual emissions" approach to determining the amount of allowable increment that remains available to a proposed major source or modification: "[T]he most reasonable approach, consistent with the statute, is to use actual source emissions . . . to calculate increment consumption or expansion." 45 Fed. Reg. at 52,718/1. In so finding, EPA explained that "[i]ncrement calculations based on the best prediction of actual emissions links PSD permitting more closely to actual air quality deterioration than calculations of allowable 'paper' emissions." *Id.* EPA emphasized the need to maintain consistency with the actual emissions test for modifications: "[U]se of actual emissions for increment consumption is consistent with using an actual emissions baseline for defining a major modification." *Id.*[20]

The NSR regulatory emissions trigger for modifications is also consistent with the statutory focus on annual emissions as the basis for NSR applicability. For example, the PSD requirements apply to "major emitting facilities," defined in terms of sources that emit pollutants above a threshold measured in "tons per year." 42 U.S.C. §§ 7475, 7479(1). For power plants, the PSD requirements govern all new sources with emissions above 100 tons per year. *Id.* § 7479(1). Similarly, 42 U.S.C. § 7475(b) provides an exception to one of the PSD pre-construction requirements that is applicable ". . . in the case of an expansion or modification of a major emitting facility . . . whose allowable emissions of air pollutants . . will be less than

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20. A new or modified source in an attainment area is also required to undertake "an analysis . . . of the ambient air quality at the proposed site . . . for each pollutant subject to regulation under the Act which will be emitted from such facility." 42 U.S.C. § 7475(e). The court in *Alabama Power* found that Congress intended this requirement to ensure "a realistic projection of air quality." 636 F.2d at 372.

fifty *tons per year*." *Id.* § 7475(b) (emphasis added). Further, each of the PSD increments over the baseline concentration is based on an "*annual* geometric mean" concentration in addition to 24-hour and 3-hour maximum concentrations. *Id.* § 7473(b) (emphasis added). Finally, the requirement that non-attainment SIPs provide "reasonable further progress" toward attainment is based on "*annual* incremental reductions in emissions of the relevant air pollutant." *Id.* § 7501(1). These provisions provide strong evidence that Congress intended the NSR provisions to apply to physical changes that increase annual emissions of pollutants.

The actual annual emissions test also furthers Congress's intent to promote responsible industrial growth in a manner that prevents deterioration of air quality. Congress believed that subjecting existing sources to control requirements when they are modified would reduce the pollution burden of existing sources, furthering Congressional intent to allow continued industrial development without harming air quality. *See id.* § 7470(3) (Congressional intent "to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources"); HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, Report 95-295, at 133 (to accompany H.R. 6161, 95th Cong. 1st Sess. 133) (May 12, 1977) ("if each new or modified major source is located, constructed, and operated so as to minimize its impact on available clean air resources, then more and bigger plants will be able to locate in the same area without serious air quality degradation"). The Fourth Circuit decision undermines this careful economic/environmental balance established by Congress under PSD because it allows physical changes that increase actual annual emissions which, in turn, may consume the PSD increment and thereby limit room for economic growth. *See WEPCo*, 893 F.2d at 909 ("too restrictive interpretation of 'modification' might upset the economic-environmental balance" established under PSD).

In sum, Congress intended the PSD program to be built upon a structure of *actual annual* emissions, from measuring ambient pollution levels, to determining whether a source is "major" or triggers the "modification" requirements, to implementing the various mechanisms for ensuring compliance with the NAAQS. The Fourth Circuit's decision should therefore be reversed.

CONCLUSION

For the reasons set forth above and in the petition, the Court should reverse the Fourth Circuit decision.

Respectfully submitted,

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ENVIRONMENTAL DEFENSE, ET AL.,
Petitioner,

v.

DUKE ENERGY CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE STAPPA AND ALAPCO IN SUPPORT OF PETITIONER

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40 C.F.R. § 51.123(e)(2).....10
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65 Fed. Reg. 2,674 (Jan. 18, 2000).....11
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INTEREST OF AMICI[1]

STAPPA[2] and ALAPCO[3] are the national organizations of state and local clean air agencies in 54 states and territories and over 165 metropolitan areas across the country. Under the Clean Air Act ("CAA"), the member agencies of STAPPA and ALAPCO have the task of developing and implementing air pollution control strategies that will protect public health and the environment throughout the nation. Our member agencies are charged with improving air that is polluted and preventing deterioration of clean air. Amici submit this brief because restoring the long-standing U.S. Environmental Protection Agency ("EPA") interpretation of the New Source Review ("NSR") rule that requires the installation of modern pollution controls is necessary for our member agencies to fulfill their statutory obligations.

INTRODUCTION

STAPPA and ALAPCO ask this Court to reverse the lower court's decision because it would prevent states and local agencies from achieving the health and environmental goals of the CAA. The number of people exposed to

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[1] The parties have consented to the filing of this brief. Letters of consent are being filed in conjunction with this brief. Pursuant to this Court's Rule 37.6, counsel states that this brief was not authored in whole or in part by counsel for a party and that no one other than amici and their counsel made a monetary contribution to the preparation or submission of this brief.

[2] The acronym "STAPPA" stands for State and Territorial Air Pollution Program Administrators.

[3] The acronym "ALAPCO" stands for Association of Local Air Pollution Control Officials.

pollution levels greater than the EPA's health-based National Ambient Air Quality Standards ("NAAQS") for ozone has been recently estimated at 158.5 million, and for fine particulate matter ("$PM_{2.5}$") at 88.4 million. *See* EPA 8-HOUR OZONE SUMMARY, *at* http://www.epa.gov/oar/oaqps/greenbk/gnsum.html; and EPA PARTICULATE MATTER ($PM_{2.5}$) NONATTAINMENT AREA SUMMARY, *at* http://www.epa.gov/oar/oaqps/greenbk/qnsum.html (last visited July 19, 2006). Pollution also adversely affects environmental quality in our national parks, state parks, and many other less urbanized areas. *See, e.g.*, NATIONAL PARK SERVICE, "AIR QUALITY IN THE NATIONAL PARKS" 9 (2002); RESOURCES FOR THE FUTURE, "VALUATION OF NATURAL RESOURCE IMPROVE- MENTS IN THE ADIRONDACKS" 26 (2004).

New Source Review is one of the tools provided state and local agencies by the CAA to manage air quality. In areas where pollution levels exceed NAAQS, NSR is a means to reduce emissions in order to attain health-based standards. NSR is also a strategy to prevent deterioration of clean air resources in order to protect national parks and other lands designated in the CAA, 42 U.S.C. § 7472, and to provide air resources to support industrial growth. NSR also serves as a tool to protect against transported pollutants, such as $PM_{2.5}$ and ozone. These pollutants are formed through chemical reactions in the atmosphere involving sulfur dioxide ("SO_2") and nitrogen oxides ("NO_x") emitted by sources outside nonattainment areas, such as electric generating units ("EGUs").

The continuing excessive emissions from superannuated coal-fired EGUs are the single largest industrial contributor to concentrations of SO_2, NO_x, ozone and $PM_{2.5}$. Seventy-one percent of the nation's coal-fired capacity is between 26 and 56 years old, with emission rates for SO_2 ranging from more than double to quadruple the emission rates of modern coal-fired units built since 1990. NATIONAL RESEARCH COUNCIL OF THE NATIONAL

ACADEMIES, "INTERIM REPORT OF THE COMMITTEE ON CHANGES IN NEW SOURCE REVIEW PROGRAMS FOR STATIONARY SOURCES OF AIR POLLUTANTS" 54, tbl.3-3 (2005). Many of these obsolete EGUs have required or will require major investments in "life-extension" projects to keep them operating. The fundamental practical question presented in this case is whether these old coal-fired EGUs, the largest and least controlled industrial sources of pollution in the country, will be required to install modern pollution control equipment when investments are made to extend their lives.

STAPPA and ALAPCO submit this brief to (1) express agreement with the petitioners' view of the law; (2) show that affirming the lower court's ruling will adversely affect the nation's air quality; (3) inform the Court that reversing the lower court's decision is necessary for state and local agencies to obtain the emission reductions needed to attain and maintain federal health-based air quality standards and protect our natural resources; (4) demonstrate that, contrary to Congressional intent, the lower court's decision would hinder economic growth and slow the modernization and clean up of our nation's energy sector; and (5) relate our concerns about the consequences for state and local clean air agencies of opening the door to collateral attacks on EPA's clean air regulations.

ARGUMENT

I. THE LOWER COURT DECISION IS CONTRARY TO THE CLEAN AIR ACT

State and local air pollution control officials agree with petitioners that the lower court decision is at odds with the fundamental objectives of NSR and the CAA. The purpose of NSR is to require major polluting facilities

"grandfathered" under the Clean Air Amendments of 1970, P.L. 91-604, 84 Stat. 1676, to be cleaned up whenever they undergo a renovation that increases emissions. *See, e.g.*, NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, "A BREATH OF FRESH AIR: REVIVING THE NEW SOURCE REVIEW PROGRAM" 14 (2003), referring to the

> clear assumption of Congress that older, high-emitting sources would gradually be upgraded or phased out. Then, once a grandfathered facility makes any changes or is replaced, NSR is triggered and requires it to install improved technologies that will prevent or control pollution. The Panel believes these requirements are, without question, designed to lead to an overall reduction in emissions from existing sources.

See also Alabama Power v. Costle, 636 F.2d 323, 400 (D.C. Cir. 1979) ("The statutory scheme intends to 'grandfather' existing industries; but the provisions concerning modifications indicate that this is not to constitute a perpetual immunity from all standards under the PSD program."); *Wisconsin Electric Power Co. v. Reilly ("WEPCO")*, 893 F.2d 901, 909 (7th Cir. 1990) ("Congress did not permanently exempt existing plants from these requirements."). The lower court's ruling is contrary to this purpose because it would exempt essentially all life-extension and other renovation projects from NSR.

II. THE LOWER COURT RULING WILL ADVERSELY AFFECT AIR QUALITY

If, as the lower court ruled, the test of whether NSR applies when existing sources are renovated must be the same as the applicability test for New Source Performance Standards ("NSPS"), 42 U.S.C. § 7411(a)(4), then virtually

all renovations on existing industrial sources of air pollution will be exempted from installing modern pollution controls. As the former head of EPA's Office of Air Quality Planning and Standards wrote, "no existing unit has become subject to new source performance standards (NSPS) under . . . the modification . . . program."[4] State and local air pollution control officials are aware of only one case, memorialized in *WEPCO*, 893 F.2d at 901, where an hourly increase in EGU emissions triggered NSR.

An hourly increase test would affect emissions in two ways. First, emissions from renovated old units will increase because they will be operated more after repair. Second, emission reductions that would have been achieved by the installation of state-of-the-art pollution control technology under NSR will be foregone. The net effect is to expose the public to significantly more air pollution.

A typical example may illustrate the point. Because of breakdowns and deterioration, an aging medium-sized (400 MW capacity) coal-fired EGU may be capable of operation at only 45 percent of its capacity. Burning medium sulfur coal without SO_2 emission controls, such a unit might emit 25,000 tons per year ("tpy") of SO_2 prior to a life-extension modification. Because of replacement of worn components, the unit might be operated 75 percent of capacity after the life-extension project. Since the EGU now generates two-thirds more electricity than it did before, the uncontrolled annual SO_2 emissions from the unit now increase to 41,666 tpy.

Under EPA's long-standing interpretation of NSR, the increase in annual emissions in this example would be subject to NSR. A modified unit subject to NSR typically would be required by state and local agencies to control SO_2

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[4] Letter from John Seitz, Director, U.S. EPA Office of Air Quality Planning and Standards, to the Honorable Robert C. Byrd (Jan. 26, 1996).

emissions with "scrubber" technology. Installing a scrubber would eliminate at least 95 percent of the SO_2 emissions. This would reduce the example EGU's SO_2 emissions from 41,666 tpy to 2,083 tpy or lower – a net reduction from the post-modification emissions of at least 39,583 tpy.

Under an hourly rate applicability test, NSR would not be triggered, and no scrubber would be installed. Hence, the net effect of applying an hourly rate test to this example, rather than the long-standing EPA annual tonnage increase test, would be to allow 39,583 tpy more emissions.

Enforcement cases brought by the U.S. Department of Justice and EPA confirm that electric utility life-extension projects have resulted in large emission increases (although they do not quantify the foregone decreases in emissions). In *U.S. v. Ohio Edison Co.*, (S.D. Ohio 2003), Judge Sargus ruled that 11 life-extension projects undertaken by Ohio Edison increased emissions of SO_2 by 14,921 tpy. 276 F.Supp.2d 829 at 869-874. In *U.S. v. American Electric Power Service Corp.*, 137 F.Supp.2d 1060 (S.D. Ohio 2001), the Department of Justice's expert witness Dr. Richard A. Rosen determined the emission increases resulting from 33 of the 47 life-extension projects undertaken by American Electric Power ("AEP") for which data were available at the time. Using AEP's own projections of the expected increase in operation of each unit, he calculated actual emissions before and after each life-extension project. Rosen Expert Report 38-39.[5] Dr. Rosen determined that, as a result of the life-extension projects, emissions of SO_2 from the units in question would increase 115,789 tpy, while NO_x emissions would increase 15,071 tpy. *Id.* Similarly, the EPA Environmental Appeals Board found in *In re TVA*, 9 E.A.B. 357 (2000), that life- extension projects undertaken by the

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[5] For the convenience of the Court, relevant excerpts of Dr. Rosen's expert report are attached as Appendix A.

Tennessee Valley Authority on just four units resulted in SO_2 emission increases of 15,077 tpy, and NO_x emission increases of 42,005 tpy.

Indeed, in the case below, *U.S. and Envtl Defense, et. al v. Duke Energy*, 278 F.Supp.2d 619 (M.D. N.C. 2003), the district judge heard testimony that the 27 life-extension projects undertaken by Duke Energy resulted in substantial increases in emissions. Using Duke's own projections of the increased operation of these units after the projects, expert witness Ranajit Sahu calculated the increase in emissions that would result. Sahu Expert Report 42-45.[6] He found that, as a result of the increased post-life-extension operation of the units, emissions of SO_2 increased 68,466 tpy; NO_x emissions increased 26,128.3 tpy; PM emissions increased 5,574.4 tpy; and PM_{10} emissions increased 3,734.6 tpy.

The point of our hypothetical example is also confirmed by a report by the EPA Inspector General. The report, published in 2004, indicated that if all nine then-pending NSR enforcement cases were successful, they would result in total SO_2 emission reductions of 1,750,361 tpy and NO_x emission reductions of 628,865 tpy nationally. OFFICE OF THE INSPECTOR GENERAL, ENVTL PROTECTION AGENCY, "NEW SOURCE REVIEW RULE CHANGE HARMS EPA'S ABILITY TO ENFORCE AGAINST COAL-FIRED ELECTRIC UTILITIES" 25 (2004).

III. STATE AND LOCAL AGENCIES CANNOT MEET THEIR OBLIGATIONS TO ATTAIN NAAQS AND PROTECT THE ENVIRONMENT WITHOUT EMISSION REDUCTIONS FROM EXISTING EGUS

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[6] Relevant excerpts of Dr. Sahu's expert report are attached as Appendix B.

State and local officials are responsible under the CAA for developing and implementing air pollution control programs that will attain and maintain the health-based NAAQS. Agencies are also responsible for managing air resources to prevent deterioration of air quality where it is better than the NAAQS. In order to accomplish these objectives, they need emission reductions from existing EGUs and other industrial units required by NSR. As the long history of air pollution control under the CAA demonstrates, there are many obstacles that state and local agencies must overcome to attain the NAAQS. An hourly emission rate test for NSR applicability would present a new – and probably insuperable – obstacle.

Currently EPA classifies 119 areas in 462 counties as "nonattainment" for the 8-hour ozone NAAQS, EPA 8-HOUR OZONE SUMMARY, *supra*, and 39 areas in 208 counties as nonattainment for $PM_{2.5}$, EPA PARTICULATE MATTER ($PM_{2.5}$) NONATTAINMENT AREA SUMMARY, *supra*. If the test for NSR applicability were an hourly emission increase, state and local officials responsible for attaining and maintaining the ozone and $PM_{2.5}$ NAAQS in these areas would be faced with an impossible task. To return to the example in the previous section, what can a state or local agency do to make up for the loss of 39,583 tpy of SO_2 emission reductions from our hypothetical EGU that no longer must undergo NSR?

In fact, that many tons of emission reductions are not available elsewhere. Large existing coal-fired EGUs account for about 76 percent of all point source emissions of SO_2; 57 percent of NO_x; and 41 percent of $PM_{2.5}$. National Academies Report, *supra*, at 49-50 figs.3-8, 3-9, 3-10. Moreover, to the extent substitute emission reductions are available from other emitters, they will be far more expensive, since the most cost-effective emission reductions come from large uncontrolled sources, such as EGUs.

STAPPA member STAPPA member New Jersey Department of Environmental Protection ("NJDEP")

demonstrates how crucial EGU emissions reductions are. The state is now in the second year of a process to identify strategies to attain the air quality standards for 8-hour ozone and $PM_{2.5}$. The NJDEP is now focusing on about 60 potential emission reduction measures, which are described in white papers posted at www.nj.gov/dep/airworkgroups/docs/wp_summary_table_web.xls. Aside from controls on EGUs, the four most effective measures identified to reduce SO_2 (a major contributor to $PM_{2.5}$) can achieve a total reduction statewide of less than 14,000 tpy. These measures include significantly reducing the sulfur content of home heating oil; further tightening emission controls at New Jersey's refineries (which are already heavily controlled); and reducing sulfur in heavy oil used in industrial and commercial boilers. The emission reductions potential of each of the other SO_2 measures identified is far less than these. By contrast, installing SO_2 scrubbers on existing New Jersey coal-fired EGUs that currently do not have SO_2 pollution control technology will achieve almost 60,000 tpy of SO_2 emission reductions.[7]

If clean air agencies are unable to find sufficient alternative emission control measures to demonstrate that they can attain NAAQS and obtain EPA approval, states and localities face sanctions mandated by the CAA. These sanctions include a cutoff of federal highway funds and requirements that new industrial sources offset emission reductions at a two-to-one ratio – effectively a ban on new construction. 42 U.S.C. § 7509(b). State failure may also result in the air pollution control program being taken over by the federal government. *See, e.g.*, 42 U.S.C. § 7410(c).

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[7] New Jersey will be able to achieve this emission reduction from its coal-fired EGUs because of a settlement in an NSR case that preceded the lower court decision. Hence in New Jersey, NSR settlements will provide the majority of the SO_2 reductions needed to achieve the $PM_{2.5}$ NAAQS.

State and local air pollution control officials do not agree with those who argue that exempting existing sources from NSR will not affect air quality because of other programs that EPA has adopted, such as the "Clean Air Interstate Rule" ("CAIR"). 70 Fed. Reg. 25,162 (May 12, 2005). The CAIR program places a cap on emissions of SO_2 and NO_x from the 28 states in the eastern half of the country, and allows states to opt into an emission trading program for covered emitters. While potentially economically efficient, CAIR incorporates a number of features that render it an inadequate substitute for NSR. First, CAIR does not apply at all in the 22 western States. 40 C.F.R. § 51.123(c). Second, CAIR addresses only emissions of SO_2 and NO_x, while NSR addresses, in addition, particulate matter, volatile organic compounds, and carbon monoxide, all of which can be expected to increase if existing sources are effectively exempted from NSR. Third, because CAIR allows units to buy emission "allowances" rather than reduce emissions, state and local agencies cannot assure the citizens affected by a particular unit that it will install state-of-the-art pollution control technology. 70 Fed. Reg. 25,162, 25,175 (May 12, 2005).

Fourth, and perhaps most important, the emission reductions promised by CAIR would not be fully realized for nearly a generation. CAIR requires no emission reductions whatsoever for the first five years, and the emissions cap is not binding until 2015. 40 C.F.R. § 51.123(e)(2). But because of the structure of the allowance market created by CAIR, EPA expects that the annual emissions in the covered states will continue to exceed the cap until some time after 2020. U.S. EPA, OFFICE OF AIR & RADIATION BRIEFING, "CLEAN AIR INTERSTATE RULE (CAIR)" 16 (2005), *available at* http://www.epa.gov/cleanairinterstaterule/charts_files/cair_final_presentation.pdf (last visited July 18, 2006) *See also* 70 Fed. Reg. 25,162, 25,166 n.4 (May 12, 2005). Information released recently by EPA indicates that, despite

CAIR, only 187 of 975 existing coal-fired EGUs (19 percent) are projected to be equipped with SO_2 "scrubbers" and Selective Catalytic Reduction ("SCR") units to control NO_x by 2010. By 2020 the number of controlled EGUs is expected to improve only to 328 of a then-projected 1041 EGUs (31 percent).[8]

Similarly, neither the "acid rain" program of Title IV of the CAA, nor the "NO_x SIP call," 63 Fed. Reg. 57,356 (Oct. 27, 1998); 65 Fed. Reg. 2,674 (Jan. 18, 2000), can substitute for NSR. Like CAIR, the acid rain program applies only to SO_2 and NO_x emissions from large EGUs, while the NO_x SIP call applies only to NO_x emissions from industrial sources (including EGUs). Most important, like CAIR, both programs provide for trading of emission allowances by affected emitters, so state and local agencies cannot assure citizens near any particular unit that emission controls will be installed on that unit.

Likewise, STAPPA and ALAPCO do not regard the CAA's visibility protection program, 42 U.S.C. §§ 7491-7492, as an adequate substitute for NSR. This program requires that "best available retrofit technology" ("BART") eventually be installed on certain existing sources that contribute to degraded visibility in the national parks, wilderness areas, and wildlife refuges. 42 U.S.C. § 7491(b)(2)(A). But BART applies only to a relatively few very large existing sources that were in operation between 1962 and 1977. 42 U.S.C. § 7491(b)(1)(A).

Finally, the majority of state and many local agencies cannot adopt their own regulations as substitutes for the NSR program. A ruling that binds EPA to an hourly rate applicability test also binds at least 13 states that administer

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[8] Testimony of William Wehrum, Acting Assistant Administrator for Air and Radiation, U.S. EPA, before the United States Sen. Comm. on Environment and Public Works, Subcomm. on Clean Air, Climate Change, and Nuclear Safety (Feb. 9, 2006).

the NSR program in clean air areas by "delegation" from EPA rather than under their own authority. Moreover, nearly half the state agencies are subject to state laws or policies that prohibit them from adopting any regulation more stringent than the minimum federal law.

IV. THE LOWER COURT RULING WILL LIMIT ECONOMIC GROWTH

An NSR program that effectively exempts renovated units from installing modern pollution control technology will limit economic growth. So long as old, polluting EGUs and other obsolete industrial units largely monopolize the nation's air resources, the opportunity for the addition of new productive capacity will be unnecessarily limited.

NSR is therefore a critical management tool used by state and local air pollution control officials to increase the potential for economic growth consistent with air quality objectives. When major capital investments are made in existing units there is an opportunity to increase an area's available air resources by requiring installation of pollution control equipment. If existing units are allowed to continue consuming a disproportionate share of the air resources, the supply of air resources available to support further economic growth will be limited.

The hypothetical example described in Section II above illustrates how the lower court's ruling would allow existing emitters to use excessive air resources. In the example, as in many real cases encountered by state and local officials, the lower court's interpretation would allow the refurbished old unit to emit 39,583 tpy more than if available pollution controls were installed. Installing a scrubber would make 39,583 tpy of air resources available to support additional industrial growth and to improve the quality of the environment.

Such pollution reductions are consistent with Congress' intent when it adopted the NSR program as a part of the program to prevent significant deterioration of air quality ("PSD"). The 1977 House Report calls PSD a "necessary economic measure designed to encourage wise use of scarce air resources and to preserve the potential for long-term economic growth." H.R. Rep. No. 95-294, at 133 (1977). By requiring pollution control equipment on both new and modified sources, the PSD program would maximize the air resources available for economic development:

> Obviously there is only a limited amount of clean air resources in all parts of the country. If new plants are built in ways which disregard the obvious limits of our air resources, then fewer plants will absorb all available air resources. But if each new or modified major source is located, constructed and operated so as to minimize its impact on available clean air resources, then more and bigger plants will be able to locate in the same area without serious air quality deterioration.

Id. at 133 (1977).

The lower court ruling, if not reversed, would turn the Congressional intent on its head. Older EGUs that have already been "grandfathered" for as long as 36 years would be rewarded by an indefinite extension of the exemption, and allowed to commandeer additional scarce air resources in perpetuity for their increased operations. The temporary exemption intended by Congress in 1970 would become permanent, while grandfathered emitters would effectively be able to override any air resource management options available to state and local air quality officials.

V. THE LOWER COURT RULING WILL HINDER THE MODERNIZATION OF AMERICAN ENERGY INFRASTRUCTURE

Some have argued that companies will be deterred from improving the efficiency of existing units if they are required to install modern pollution controls when they invest in life-extension projects. To the contrary, efficiency gains come from replacing obsolete units with new ones. By forcing old units to address their public health and environmental externalities, NSR levels the playing field for innovation.

In adopting NSR, Congress intended that facilities would have "incentives for improved technology," that those improvements would "become widespread far more rapidly," and that vendors of cleaner technologies would have a "guaranteed market." *See* S. Rep. No. 95-127, at 31 (1977), *reprinted in* 1977 CRS Legislative History 1371, 1405; *See also* H.R. Rep. No. 95-294, at 186 (1977), *reprinted in* 1977 CRS Legislative History 2465, 2653.

The lower court's ruling is entirely contrary to this objective of NSR. It would allow many existing plants to increase their emissions with little or no improvement in the efficiency of their operations. Breakthrough technology gains do not happen by maintaining and repairing obsolete production capacity, but instead come when new plants are brought on line. The efficiency of new state-of-the-art electric generation facilities today is far higher than was standard in the 1970s.

Any modest efficiency improvements that might result from life-extension projects at units avoiding NSR would be eclipsed by increased hours of operation and extended years of service, resulting in greater overall emissions.

Moreover, by allowing old, dirty plants to extend their operational lives without having to install the modern

pollution controls required of new facilities, while new plants incur higher environmental costs, an hourly rate applicability test for NSR would give old plants a perverse advantage when it comes to bidding for power supply contracts. As in any sector, financial capital is limited within the power industry. The lower court's decision would divert capital from developing new clean plants to maintaining old dirty ones because older units that were renovated without installing pollution controls would be able to generate power more cheaply than cleaner new units. So long as one set of competitors is required by law to internalize the societal costs of air pollution while another set is granted almost indefinite exemptions, the nation's energy markets and economy will be distorted and its air quality impaired.

Exempting obsolete EGUs and other industrial sources from NSR would nullify the CAA's incentive to encourage lower emissions by stimulating the development of advanced, cleaner, more efficient electric generating technologies. *See* 42 U.S.C. § 7475(a)(4). Congress first adopted "technology forcing" in the Clean Air Amendments of 1970, *Alabama Power,* 636 F.2d at 372, in order to achieve the CAA's public health and environmental goals.[9]

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[9] The federal courts have consistently upheld the CAA's goal to stimulate technological innovation as a way to achieve higher environmental goals. In 1973, the U.S. Court of Appeals for the District of Columbia Circuit rejected the argument that EPA was limited to standards requiring "technology in being as of the time of the application." *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 629 (D.C. Cir. 1973); *see also Natural Resources Defense Council v. Thomas*, 805 F.2d 410, 429 (D.C. Cir. 1986); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 391 (D.C. Cir. 1973); *Natural Resources Defense Council v. EPA*, 655 F.2d 318, 328 (D.C. Cir. 1981)("EPA was 'expected to press for the development and application of improved technology rather than be limited by that which exists today.'" [citations omitted]); *WEPCO* 893 F.2d at 909-10 (7th Cir. 1990) ("[I]n passing the Clean Air Act Amendments, Congress intended to stimulate the advancement of pollution control technology."); *Husqvarna v. EPA*, 254 F.3d 195 (D.C.

Technologies developed in response to this policy, such as automobile emission control technologies, sulfur oxide scrubbers, and NO_x-removing SCR units, have reduced emissions even as the American economy has grown several-fold since 1970.

VI. STATE AND LOCAL AGENCIES NEED CERTAINTY REGARDING FEDERAL ENVIRONMENTAL REGULATION

For 36 years, the CAA has been interpreted to require any challenge to nationally-applicable EPA regulations to be filed within a limited time after promulgation and decided in the United States Court of Appeals for the District of Columbia Circuit. *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 588–592 (1980); *1000 Friends of Maryland v. Browner*, 265 F.3d 216, 223 (4th Cir. 2001); *Massachusetts v. EPA*, 415 F.3d 50, 53 (D.C. Cir. 2005); *Ohio Public Interest Research Group, Inc. v. Whitman*, 386 F.3d 792, 799 (6th Cir. 2004); *U.S. v. Ho*, 311 F.3d 589, 607 (5th Cir. 2002); *Indianapolis Power & Light Co. v. EPA*, 38 Fed. Appx. 613, 614 (D.C. Cir. 2002); *National Petrochemical & Refiners Ass'n v. E.P.A.*, 287 F.3d 1130, 1150 (D.C. Cir. 2002); *Environmental Defense Fund v. Thomas*, 870 F.2d 892, 896 (2nd Cir. 1989). Other federal environmental laws are patterned after the CAA, limiting the time of filing for review. Resource Conservation and Recovery Act ("RCRA") § 7006, 42 U.S.C. § 6976 (a)(1); Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") § 113(a), 42 U.S.C. § 9613(a). Surface Mining Control and Reclamation Act of 1977, § 526(1), 30 U.S.C. § 1276(a)(1); Toxic Substances Control Act, 15 U.S.C. § 2618(a)(1)(A)

Cir. 2001) ("Congress intended the agency to project future advances in pollution control capability.") (citing *NRDC*, 805 F.2d at 410).

(1998). CERCLA and RCRA also place exclusive jurisdiction to review EPA regulations in the D.C. Circuit.

As a result, challenges to EPA regulations adopted under the Clean Air Act have been resolved expeditiously and with finality. As state and local air pollution control officials, we believe this feature has been important to the workability and success of the CAA.

Expeditious and final resolution of litigation against EPA rules has allowed state and local agencies the certainty they need in order to carry out their duties under the Clean Air Act. Many CAA programs require state and local agencies to develop complex regulatory structures on a statutory timetable. *See, e.g.*, 42 U.S.C. § 7410 (State Implementation Plan); 42 U.S.C. § 7412(*l*) (Implementation of Hazardous Air Pollutant program); (42 U.S.C. § 7429(b)(2) (Enforcement Plan for Solid Waste Combustion Guidelines); 42 U.S.C. § 7471 (PSD program); 42 U.S.C. §§ 7502 and 7511 (Nonattainment plan provisions); 42 U.S.C. § 7661a(d) (Permit programs).

The lower court's decision would unfortunately open a door to collateral attack on EPA's CAA regulations that would make it difficult for a state or local agency to administer its air pollution control programs in a rational manner. Under the lower court decision, the members of STAPPA and ALAPCO fear that no federal regulation would ever have a settled and reliable meaning. To extend the period of uncertainty over EPA regulations would make it difficult for state and local agencies to meet statutory deadlines. Thus affirming the lower court's end run on Section 307 of the CAA would weaken the ability of state and local air pollution agencies, who best understand local circumstances, to deal with air pollution within their boundaries.

CONCLUSION

For the foregoing reasons, amici STAPPA and ALAPCO support the petitioners' position that the lower court decision should be reversed.

Respectfully submitted.

JULY 21, 2006

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APPENDIX

APPENDIX A

Richard Rosen
Expert Testimony Report
On Behalf of the United States of America, the State-Intervenor Plaintiffs, and the Citizen Plaintiffs

August 2, 2004 (Revised May, 4 2005)

In the United States District Court for the Southern District of Ohio, Eastern Division

Civil Action No. C2-99-1182
United States of America v. American Electric Power Service Corp.
Civil Action No. C2-99-1250
Ohio Citizen Action v. American Electric Power Service Corp.

[Rosen Expert Report page 37]

10.2 Calculation #2: Actual Emissions Compared to Projected Future Actual Emissions Based on Company Projections

In this calculation, I examined AEP's own projections of re-gained availability heat rate, and capacity from each generating unit that was expected to occur as a result of each activity where that data was available in the relevant Capital Improvement Requisition form (to the extent such projections were made). I then translated that recovered availability, heat rate, and/or capacity once the activity was completed into a change in generation, and subsequently into a change in emissions. For the 47 activities at the AEP units studied, adequate data was only available for 33 activities as of the present time. The results of these calculations appear in Table 4.

[Rosen Expert Report page 38]

Table 4
NSR/PSD Net Emissions Increases
-Calculation #2-
Actual to Projected Future Actual Based on Company Data

		SO_2	NO_x	PM or PM_{10}
Activity #	CIR#	(Tons per Year)		
AM1	12012	221	174	1
AM2	12130	104	82	0
AM5	12473 (APCo) 72778 (OPCo)	51	-13,286	0
CD1	71448/ 71516	11,592	4,182	-1.637
CD2	72201	608	154	2
CD3	72373	8,353	2,136	26
CD4	71449/ 71517	11,094	3,887	-3,881
CD5	98066	621	154	2
CD6	98085	8,942	2,361	30
CR1	12502	316	386	2
CR2	12502	327	390	2
CR3	12502	323	385	2
CV1	75140	1,797	529	1
CV2	75246	1,879	554	1
MI1	72462	268	125	1
MI3	72206	559	224	2
MR1	72172	1,779	320	3

MR3	72173	2,141	386	4
MR5	72162/ 72254/ 72258	6,606	1,252	10
MR7	72163/ 72255/ 72259	6,233	1,219	9
MR8	72398	1,434	272	2

[Rosen Expert Report page 39]

MR11	71450/ 71505/ 71665	25,915	4,845	-1,669
MR12	72202	889	158	2
MR13	71966	7,368	1,440	27
MR 14	72372	12,902	2,434	33
SP1	12147/ 12166	248	177	1
SP2	72421T 72466	255	172	1
SP3	72464	47	32	0
SP4	12148	273	181	1
SP5	72429	239	176	1
SP8	72393	477	267	3
TC2	31140	1,002	348	1

TC4	31737	926	-1,045	1

APPENDIX B

Ranajit (Ron) Sahu
Expert Testimony Report
On Behalf of the United States

August 1, 2002

In the United States District Court for the Middle District of North Carolina

Civil Action No. 1:00 CV 1262
United States v. Duke Energy Corporation

[Sahu Expert Report page 37]

VI.1.2. *PSD Emissions Comparison Tests*

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[Sahu Expert Report page 38]

1. Prior Two Year Actual Average Emissions Versus Potential to Emit After Modification

In this method, the actual emissions for the prior 24 continuous months (two years) before the modification[10] were calculated and compared with potential to emit for the unit after modification. In other words, the Unit Calculations A and B discussed earlier were performed and compared

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2. Before and After Modification Emissions Difference Based on Company Capacity Factor Projections

In this method, the emissions "delta" is estimated by comparing the baseline emissions as calculated using Unit Calculation A (using the period 24 months prior to the modification for modification when the WEPCO Rule did not apply or using the 24 month period within the prior 60 month period with the highest emissions for modification when the WEPCO Rule applied) with the company

[Sahu Expert Report page 39]

projection calculations conducted using Unit Calculation C discussed earlier. In making this comparison, I used the

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[10] The smallest calculation time period is a calendar month. It is also assumed that a particular modification was initiated and completed within a specific outage that began on a certain date and ended on a certain date. Depending on the starting date of the outage, either the previous full calendar month (if the outage began towards the beginning of a calendar month) or the month of the outage itself (if the outage began towards the end of a calendar month) was used as the last month before the outage.

company projections for future years 9 and 10[11] [in one case (Buck 3) only years 8 and 9 were available and in another case (Belews Creek Unit 2, 1999 Mod) years 8 and 9 were used since year 10 had a non-representatively low capacity factor presumably due to an anticipated turbine outage] with the prior 24 month baseline.

3. Emissions Change Based on GADS Activity Factor Data for Two Years Before Modification

In this method, the emissions change corresponding to a particular modification was directly estimated based on GADS-based activity factors such as recovered capacity, appropriately adjusted for capacity or utilization factor, as needed. In other words the Unit Calculation D discussed earlier was used to estimate this emissions change directly. For units that entered the PMP program, GADS loss data are often sparse. This is because, even prior to entering PMP, these units were not running very often and, there was ample opportunity to make relevant repairs to components, as needed, during such downtime.

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[11] The preferred choice to use years 9 and 10 (or 8 and 9 as noted above) for this comparison was made based on several consideration: (a) Duke has made projections as far as 10 years for a reason, namely that the 10 year planning horizon was a reasonable basis for future unit operations; (b) in the case of the PMP units, Duke's decision to gradually ramp up the unit capacities factors in the years following PMP (essentially converting these previously peaking or load-following units into base-loaded units as its system load increased) rendered the choice of other years (say years 1 and 2 or years 4 and 5, for example) moot since these other choices would not be compatible with how Duke intended to run the units in the foreseeable future; (c) years 9 and 10 were the farthest future years with forecasted capacity projections that shed light on Duke's intended plan for running its units; and finally, (d) consistency in using similar time frames for all units for purposes of making emissions estimates.

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Table 1 – Summary Emissions Increase Results (Tons/Yr) for PSD Applicability

Modification/ Comparison Test	**Pollutant[1]**			
	SO_2	**NO_x**	**PM**	**PM_{10}[2]**
PSD Significant Emissions Rate (SER)	***40***	***40***	***25***	***15***
	SO_2	**NO_x**	**PM**	**PM_{10}[2]**
Modification #6-Allen 1 (1989)				
Comparison Test 1	11496.5	4538.1	1527.7	1023.6
Comparison Test 2	3430.4	1857.1	620.3	415.6
Comparison Test 3	55.7	30.1	10.1	6.8
Modification #5-Allen 2 (1988)				
Comparison Test 1	12559.4	4957.7	2782.4	1864.2
Comparison Test 2	2991.6	1610.3	690.1	462.4
Comparison Test 3	34.2	17.7	6.8	4.6
Modification #23-Allen 3 (1994)				
Comparison Test 1	15845.6	2377.0	1468.4	983.8
Comparison Test 2	1705.0	-	237.4	158.8
Comparison Test 3	21.5	5.6	1.6	1.1
Modification # 3-Allen 4 (1996)				
Comparison Test 1	13594.2	2235.0	773.4	518.2
Comparison Test 2	260.1	-	-	-
Comparison Test 3	195.3	65.0	11.3	7.6
Modification #4-Allen 4 (1998)				
Comparison Test 1	11124.6	2751.0	1330.3	891.3

Comparison Test 2	2114.6	872.9	597.0	400.0
Comparison Test 3	150.3	60.6	14.5	9.7
Modification #2-Allen 5 (1996)				
Comparison Test 1	14294.1	2210.9	1718.2	1151.2
Comparison Test 2	3324.4	191.2	408.7	273.8
Comparison Test 3	234.3	79.4	27.8	18.6
Modification #1-Allen 5 (2000)				
Comparison Test 1	8153.1	2395.1	-	-
Comparison Test 2	880.0	481.3	-	-
Comparison Test 3	229.7	89.0	10.0	6.7
Modification #9-Belews Creek 1 (2000)				
Comparison Test 1	14909.3	-	-	-

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Comparison Test 2	-	-	-	-
Comparison Test 3	1319.8	537.2	35.5	23.8
Modification #8-Belews Creek 2 (1996)				
Comparison Test 1	33644.4	22678.3	1077.5	721.9
Comparison Test 2[3]	-	-	-	-
Comparison Test 3	202.0	222.5	8.7	5.8
Modification #7-Belews Creek 2 (1999)				
Comparison Test 1	15719.2	-	-	-
Comparison Test 2[4]	-	-	-	-
Comparison Test 3	331.3	147.3	11.0	7.4

Modification #12-Buck (1994)				
Comparison Test 1	6208.8	3063.6	369.4	247.5
Comparison Test 2	873.4	278.7	44.6	29.9
Comparison Test 3	0.0	0.0	0.0	0.0
Modification #11-Buck 4 (1994)				
Comparison Test 1	2981.3	1471.0	169.3	113.4
Comparison Test 2	827.3	264.0	36.7	24.6
Comparison Test 3	4.8	2.4	0.2	0.1

Modification #10-Buck 5 (1991)				
Comparison Test 1	9767.9	3855.8	387.1	259.4
Comparison Test 2	2415.9	1223.9	87.8	58.8
Comparison Test 3	97.7	49.5	3.6	2.4
Modification #28-Buck 6 (1990)				
Comparison Test 1	9678.2	3179.8	249.5	167.2
Comparison Test 2	361.1	356.3	2.1	1.4
Comparison Test 3	50.0	33.2	2.0	1.3
Modification #21-Cliffside 1 (1993)				
Comparison Test 1	6267.9	2249.2	503.8	337.5
Comparison Test 2	528.8	272.2	51.4	34.4
Comparison Test 3	2.7	1.4	0.3	0.2
Modification #17-Cliffside 2 (1993)				
Comparison Test 1	5468.3	2158.5	759.8	509.1
Comparison Test 2	641.1	308.3	108.6	72.8
Comparison Test 3	0.0	0.0	0.0	0.0
Modification #18-Cliffside 3 (1991)				

Comparison Test 1	9183.8	3295.6	862.2	577.7
Comparison Test 2	960.4	429.2	110.7	74.2
Comparison Test 3	45.2	20.2	5.2	3.5
Modification #19-Cliffside 4 (1991)				
Comparison Test 1	6525.7	2341.8	637.5	427.1
Comparison Test 2	771.9	395.3	89.1	59.7
Comparison Test 3	5.7	2.9	0.7	0.5
Modification #20-Cliffside 5 (1992)[4]				
Comparison Test 1	30934.4	10164.1	1339.1	897.2
Comparison Test 2	10339.1	4394.2	53.1	35.6
Comparison Test 3[4]	0.0	0.0	0.0	0.0
Modification #20-Cliffside 5 (1995)[4]				
Comparison Test 1	24077.8	3089.8	2496.1	1672.4
Comparison Test 2	5687.6	2464.6	-	-
Comparison Test 3	177.7	48.3	14.1	9.4
Modification #22-Dan River 3 (1998)				
Comparison Test 1	10755.8	4245.7	609.7	408.5
Comparison Test 2	2160.0	1065.8	147.3	98.7
Comparison Test 3	617.9	304.9	51.2	34.3
Modification #29-Marshall 1 (1992)				
Comparison Test 1	14217.7	4581.1	272.5	182.6
Comparison Test 2	4067.5	1491.3	-	-
Comparison Test 3	212.9	83.3	8.4	5.6
Modification #15-				

Marshall 2 (1989)				
Comparison Test 1	14146.0	4456.2	1198.9	803.3
Comparison Test 2	2690.8	1091.9	42.3	28.3
Comparison Test 3	873.2	358.1	62.2	41.7
Modification #16-Marshall 2 (1996)				
Comparison Test 1	10356.4	373.6	1673.7	1121.4
Comparison Test 2	5233.8	-	924.8	619.6
Comparison Test 3	131.3	37.0	9.1	6.1
Modification #14-Marshall 3 (1999)				
Comparison Test 1	19530.2	4107.9	466.4	312.5
Comparison Test 2	502.2	188.3	88.4	59.2
Comparison Test 3	793.7	280.9	19.5	13.1

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Modification #13-Marshall 4 (1990)				
Comparison Test 1	22399.4	7166.8	2569.2	1721.4
Comparison Test 2	7347.2	2897.7	942.2	631.3
Comparison Test 3	1299.7	518.2	113.4	76.0
Modification #24-Lee 3 (1989/90)				
Comparison Test 1	9861.7	3387.2	227.5	152.4
Comparison Test 2	488.2	380.9	17.5	11.7
Comparison Test 3	162.8	78.7	4.6	3.1
Modification #25-Riverbend 4 (1990)				
Comparison Test 1	8691.3	2859.0	137.8	92.3
Comparison Test 2	1582.2	715.6	35.6	23.9
Comparison Test 3	93.6	42.3	2.1	1.4
Modification #26-				

Riverbend 6 (1991)				
Comparison Test 1	15395.7	5064.4	482.9	323.5
Comparison Test 2	2066.9	1247.2	102.0	68.3
Comparison Test 3	312.7	188.7	15.4	10.3
Modification #27-Riverbend 7 (1992)				
Comparison Test 1	10678.6	3512.7	340.1	227.9
Comparison Test 2	4215.2	1650.1	136.7	91.6
Comparison Test 3	313.1	122.6	10.2	6.8

Notes:

[1] "-" denotes a negative value or reduction in the comparison for that case. In many such cases, the NO_x comparisons show a reduction because of the installation or planned installation of low-NO_x technologies at that unit that were factored into the calculation of future projected NO_x emissions. PM emissions were somewhat erratic given the significant variability in the annual PM source test results that were used in the calculations.

[2] PM_{10} was estimated as 67% of PM emissions, per AP-42, Table 1.1-6.

[3] For this modification, it should be noted that its capacity factor in the baseline year as well as in the projection years was generally high given that it is a base loaded unit. For example its baseline year capacity factor was around 73% while its average post-mod year 1/2 and year 9/10 capacity factor projection were 76% and 78.5%, respectively. Even though there is a capacity factor increase, there appears to be a reduction in the projected SO_2 emissions in the projected years as compared to the baseline period because the sulfur content in the coal in the baseline period (i.e., 24 month period with the highest SO_2 emissions for this potentially WEPCO Rule-eligible unit) was higher (i.e. 0.99%) than in the years preceding the modification (0.83%) and the latter

was used to make the future projections, giving Duke the benefit of lower sulfur content in the future, even though this low sulfur content is not enforceable via permits or other means. If, on the other hand, an average sulfur content for the entire five year period preceding the modification (0.89%) is used for all calculations (i.e. baseline actual and future projections[)], there would be an increase in Comparison Test 2 for this case.

[4] Although the complaint listed the modification as having occurred in 1992 and 1995, emissions calculations are provided for both 1992 and 1995 changes separately. The lack of GADS based losses attributable to the economizer prior to the 1992 modification (in which the economizer was replaced given its documented [see Bates 62CS001] poor performance in preceding years) needs further discussion. Closer inspection of the GADS data show that this base load, low heat rate (i.e., economically efficient) unit was

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not operating for a significant portion of time preceding the 1992 modification and was listed as being in reserve shutdown. It is possible that repairs to the malfunctioning economizer were made during periods of reserve shutdown and therefore such periods of time did not get attributed to the economizer repair.

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ENVIRONMENTAL DEFENSE, *et al.*,
Petitioners,

v.

DUKE ENERGY CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT DUKE ENERGY CORPORATION

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INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center based in Washington, D.C., with supporters nationwide.[1] WLF devotes substantial resources to defending and promoting economic liberty, free enterprise principles, and a limited and accountable government.

To that end, WLF has appeared before this and lower federal courts in cases raising important constitutional and statutory questions regarding the scope and lawfulness of an agency's regulatory and enforcement authority. *See, e.g.*, *United States v. Rapanos*, 126 Sup. Ct. 2208 (2006); *Whitman v. Am. Trucking Assn's, Inc.*, 531 U.S. 457 (2001); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). In addition, WLF's Legal Studies Division publishes legal policy papers on these topics and sponsors related education programs and briefings.

This case raises important issues under the Clean Air Act regarding the authority of the federal district courts to adjudicate defenses to the Environmental Protection Agency (EPA)'s enforcement actions, where, as here, the targeted company is not challenging the validity of the underlying rule, but the validity of the Agency's interpretation and application of the rule. WLF believes that as a matter of law, fundamental fairness, and sound public policy, district courts should not be precluded from adjudicating the merits of these defenses.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amicus* and its counsel, made a monetary contribution to the preparation or submission of this brief. Letters of consent by the parties to the filing of this brief are on file with the Office of the Clerk.

WLF's brief will focus on this jurisdictional issue and its broader implications, although *amicus* agrees with Duke Energy Corporation ("Duke Energy") that the lower courts properly decided the merits in its favor.

INTRODUCTION AND STATEMENT OF THE CASE

In the interests of judicial economy, *amicus* adopts the Statement of the Case as presented by Duke Energy. In brief, in 1999, the Environmental Protection Agency (EPA) launched an enforcement action against Duke Energy (as well as many other utilities) in district court under the Clean Air Act, claiming that its coal-fired power plants violated the EPA's 1980 Prevention of Significant Deterioration (PSD) Rule. Petitioners Environmental Defense, *et al.*, intervened.[2]

Duke Energy defended itself by arguing that the EPA's newfound litigation position interpreting the 1980 PSD Rule was contrary to the plain language of the statute, the rule itself, and EPA's contemporaneous interpretation of the 1980 Rule. The district court agreed with Duke Energy, the court of appeals affirmed, and this Court granted review.

Petitioners argue here that the lower courts were precluded from adjudicating the merits of Duke Energy's defense because it allegedly constituted judicial review of the 1980 PSD Rule itself, and that under Section 307(b)'s judicial review provisions of the Clean Air Act, such review lies exclusively with the U.S. Court of Appeals for the

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[2] Though the United States is nominally a Respondent in this Court, *amicus*' reference to Petitioners in this brief should be understood to include the United States and the EPA collectively unless otherwise noted.

District of Columbia Circuit. *See* 42 U.S.C. § 7607(b)(1).

Petitioners alternatively argue that even if the lower courts could adjudicate Duke Energy's defense to the EPA's enforcement action, they wrongly decided the merits of the case. As noted, *amicus* will focus its brief on the jurisdictional question presented in this case.

SUMMARY OF ARGUMENT

When Congress enacted the judicial review provisions of the Clean Air Act, it specified that certain EPA final rules, air quality standards, and similar final agency actions would be judicially reviewable only in the U.S. Court of Appeals for the District of Columbia Circuit upon a filing of a petition for review within 60 days after the publication of the rule, regulation, standard, or other final action in the *Federal Register*. *See* 42 U.S.C. § 7607(b). In doing so, Congress surely did not intend that a regulated entity subject to a subsequent civil or criminal enforcement action brought by the EPA to enforce one of its rules in a district court would be precluded from raising as a valid defense that the agency's litigation position misinterprets or misapplies its otherwise valid regulation.

Indeed, Congress made it clear in § 307(b)(2) that only "action" by the EPA Administrator that could have otherwise been subject to judicial review in the D.C. Circuit under § 307(b)(1) (namely, final rules, standards, and similar "final action") is not reviewable in civil or criminal enforcement actions. Because the agency's multiple and shifting *interpretations* of a regulation in an enforcement action is *not* final agency action, and thus, could not have been raised by filing a petition for review, by necessary implication, Congress did not foreclose the normal

adjudication of the issue either in the district court or subsequently on appeal.

In the instant case, Duke Energy is not challenging the validity of the 1980 PSD Rule itself. Rather, both courts below had jurisdiction to adjudicate Duke Energy's defense that the EPA's litigation position as to the meaning or interpretation of its 1980 PSD Rule was legally unsound. To hold otherwise would unfairly bar Duke Energy from interposing a valid defense to an agency enforcement action, and raise serious constitutional questions regarding the availability of judicial review by preventing courts from carrying out their duty to say what the law is.

Finally, reading § 307(b) to preclude Duke Energy's defense to an enforcement action would not serve the overall purpose and structure of the judicial review provisions of the Clean Air Act -- uniformity and administrative efficiency. It would instead allow the EPA to make ad hoc regulations in the guise of enforcement actions to suit its needs.

ARGUMENT

I. SECTION 307(B)(2) OF THE CLEAN AIR ACT SHOULD NOT BE READ TO PRECLUDE THE ADJUDICATION OF DUKE ENERGY'S CHALLENGE TO EPA'S NEWFOUND INTERPRETATION OF THE 1980 PSD RULE

Over the last 25 years, the EPA has at times advanced several distinct interpretations of its 1980 PSD Rule that were inconsistent with the meaning it adopted at

the time of the rule's promulgation.[3] In addition to its shifting re-interpretations over time, EPA has also claimed in a recent rulemaking that identical language in the 1980 PSD Rule is to be applied differently to electric utilities and non-electric utilities.[4] Under this ad hoc interpretation of the 1980 PSD Rule, the single "major modification" definition mandates an "actual-to-potential" test for all existing non-electric utility sources, but only an "actual-to-projected-actual" test for existing electric utility sources. Yet in 1992, EPA disavowed the "actual-to-potential" interpretation. *See* 57 Fed. Reg. 32,314, 32,317 (July 21, 1992).

Petitioners argue nevertheless that the lower courts lacked jurisdiction to adjudicate Duke Energy's defense in this civil enforcement action because § 307(b)(2) states that "[a]ction of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement." 42 U.S.C. § 7607(b)(2). That argument lacks merit and should be rejected. Otherwise, the EPA will assert authority to reinterpret its regulations to suit its needs,

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[3] *Compare United States v. Duke Energy Corp.*, 278 F.Supp. 2d 619, 641 (M.D.N.C. 2003) (noting immediately after the promulgation of the PSD regulations in 1980, EPA announced that "the requirements of PSD would be implicated only by an increase in the hourly rate of emissions") *with Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 915-17 (7th Cir. 1990) *and* United States Br. at 20 (claiming that "[t]he only reasonable construction of the PSD regulations is that a physical change that increases a source's hours of operation is a 'modification.'").

[4] *See* 67 Fed. Reg. 80,186, 80,199 (Dec. 31, 2002). Yet the Clean Air Act defines "construction" and "modification" the same for all stationary sources and does not differentiate between electric and non-electric utilities.

and insulate any challenge to the lawfulness of its new interpretation by bringing costly enforcement actions based on its flawed interpretation.

Section 307(b)(2) bars judicial review in an enforcement action only with respect to "action" by the EPA Administrator that "could have been obtained" in a prior judicial review proceeding in the D.C. Circuit. Such pre-enforcement challenges to EPA final rules, standards, or regulations brought within the statutory 60-day period from their publication in the *Federal Register* are necessarily facial challenges. *Cf. INS v. Nat'l Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 188 (1991) ("That the regulation may be invalid in [some] cases . . . does not mean that the regulation is facially invalid . . . ."). This is so because the agency will rarely have applied the rule to a sufficient number of situations as to have fully explicated the rule's meaning.

However, this does not affect the court's duty to determine the lawfulness of an agency's multiple interpretations of a regulation in the context of a specific enforcement action. In such a case, there simply is no "final action" taken that could be subject to "judicial review" under § 307(b)(1). Rather, the promulgated regulation remains intact and can be applied in future cases even though a district court can declare its application in a particular case before it to be unlawful. Thus, when EPA interpreted the 1980 PSD Rule in such a way as to bring Duke Energy's projects into question, it opened the door for the company to raise a defense that the EPA's interpretation was wrong.

The plain language of § 307(b) does not prevent district courts which otherwise have jurisdiction to hear a

dispute to "say what the law is,"[5] *i.e.*, to determine the proper interpretation of all statutes and regulations before them. Even if the court in an appropriate case defers to the agency when more than one meaning is possible, it is still the court that is expounding the law. The legislative history of § 307 further buttresses this proposition. According to the Senate Committee Report, a regulated entity such as Duke Energy "would not be precluded from seeking such review at the time of enforcement insofar as the subject matter applied to him alone." S. Rep. 91-1196, at 41 (1970). *See also Utah Power & Light Co. v. EPA*, 553 F.2d 215, 218 (D.C. Cir. 1977) (noting distinction between challenge to regulation and challenge to agency application or interpretation of regulation for purposes of seeking judicial review).

Duke Energy's argument that the 1980 PSD Rule's definition of "major modification" includes a "modification" within the meaning of the NSPS program is a legitimate challenge to EPA's *interpretation* or application of its 1980 PSD Rule, and therefore presents a question of law suitable for resolution in an enforcement action brought by the agency. It does not turn on the validity of the agency's reasoning in an administrative proceeding or the sufficiency of any administrative record. As such, when the court below determined that EPA's litigation interpretation would conflict with the Clean Air Act's plain language and must be rejected, the Fourth Circuit was operating well within its authority to decide if the agency's interpretation of its regulation was legally sound and would be applied to this case.

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[5] *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

II. CONGRESS ENACTED SECTION 307(b) WITH THE UNDERSTANDING THAT IT HAD EXPANSIVE BUT NOT UNLIMITED POWER TO CONTROL THE JURISDICTION OF THE LOWER FEDERAL COURTS

Section 307(b)'s language should not be read to suggest that the courts below were precluded from reaching the merits of Duke Energy's defense. To do so would raise a difficult constitutional question: Can Congress place within the federal court's jurisdiction responsibility to decide a civil judicial enforcement action, but refuse to permit that same court to determine whether the agency's interpretation of the dispositive regulation in the case is lawful? As a matter of constitutional avoidance, this Court should construe § 307(b), as it has in other contexts, to mean that Congress did not intend "to place courts in [the] untenable position" of entering judgment based on an unreviewable executive action. *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 430 (1995).

Our constitutional structure gives Congress broad authority under Article III to control the jurisdiction of both the lower federal courts and the Supreme Court. As this Court stated in *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448-49 (1850):

> Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all. The Constitution has defined the limits of the

> judicial power of the United States, but has not prescribed how much of it shall be exercised by the [lower federal court]; consequently, the statute which does prescribed the limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein.

See also Lockerty v. Phillips, 319 U.S. 182, 187 (1943) ("The Congressional power to ordain and establish inferior courts includes the power of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.") (internal quotations omitted).

But while Congress's authority to control the jurisdiction of the federal courts is broad, certain types of restrictions on the exercise of the judicial power are so antithetical to our constitutional structure that they will not be permitted. For example, Congress cannot commandeer the federal courts to exercise their judicial power in a way that makes the courts nothing but a cipher for legislative action. *See United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1872) (refusing to permit Congress to "prescribe rules of decision to the Judicial Department of the government in cases pending before it"). Congress likewise cannot revise the absolutely final judgment of an Article III tribunal. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). Some courts have asserted that Congress may not prevent all judicial tribunals from litigating constitutional claims. *See Battaglia v. Gen. Motors Corp.*, 169 F.2d 254, 257 (2d Cir. 1948) ("[W]hile Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the

Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation.").

Finally, judicial independence is threatened when Congress vests a federal court with the jurisdiction and duty to decide a particular type of case as it did here, but then refuses to permit the court to review the Executive's determination of the key issue necessary to the proper resolution of that case. This Court's decision in *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995), is particularly instructive on this point.

In *Gutierrez*, this Court considered the reviewability of a determination by the Attorney General under the Westfall Act that a government agent was acting within the scope of his employment. When a federal employee is sued for a negligent act, the Westfall Act permits the Attorney General to certify that the employee was acting within the scope of his employment at the time the claim arose. This certification causes the United States to be substituted for the employee as defendant in the suit. The action then proceeds under the terms of the Federal Tort Claims Act, which includes a limitation against waiving the United States government's sovereign immunity for torts occurring outside the United States' borders.

The facts in *Gutierrez de Martinez* concerned just such a situation. In *Gutierrez*, a federal agent injured several persons in a car accident in Colombia, and the injured persons brought suit against the agent in federal district court. The United States Attorney for that district certified that the employee was acting within the scope of his duties at the time of the crash, causing the United States

to be substituted as defendant. Upon certification, the district court determined that it lacked jurisdiction of the action and dismissed the suit, rejecting plaintiff's arguments that the certification was reviewable.

In holding that the Attorney General's certification was reviewable, the Court noted the "surreal" situation presented by precluding judicial review. "The key question presented—scope of employment—however contestable in fact, would receive no judicial audience. The Court could do no more, and no less, than convert the executive's scarcely disinterested decision into a court judgment." *Id.* at 429. As a result, the Court stated that while Congress may establish compensation schemes that operate without judicial participation, it will not presume that Congress intended "a court automatically to enter a judgment pursuant to a decision the court has no authority to evaluate." *Id.* at 430 (citing *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1872)).

Accordingly, this Court should reject the Petitioners' argument that § 307(b) should be read to preclude the adjudication of Duke Energy's defense in the courts below.

III. PRECLUDING DUKE ENERGY'S CHALLENGE TO EPA'S LITIGATION INTERPRETATION OF THE 1980 PSD RULE WOULD FRUSTRATE CONGRESS'S PURPOSES IN ENACTING § 307(B)

Congress imposes restrictions on judicial review when compelling reasons exist for doing so. Here, Congress designed § 307(b) to serve two compelling purposes. First, it ensures that EPA final rules, standards, and similar final action under the Clean Air Act are "uniformly applied and

interpreted." S. Rep. 91-1196, at 40 (1970). Second, it ensures that EPA regulations and other final actions are "quickly reviewed by a single court intimately familiar with administrative procedures." *Id.* Section 307(b) was never intended to shield the agency from being challenged for its unlawful and unjustified enforcement actions.

A. Precluding Review of EPA's Litigation Position Does Not Serve Purposes of Uniformity

Congress enacted § 307(b) in part to ensure that agency action is uniformly applied and interpreted. Where the EPA provides multiple and inconsistent interpretations of its rules, or applies identical statutory language differently depending on the type of regulated entity or the area in which it is located, this purpose is not served. EPA's enforcement action against Duke Energy is precisely such a case.

Although not often acknowledged, Congress tacitly assumes that when EPA and other administrative agencies exercise their delegated power to fill the gaps in statutory schemes that Congress left unfilled, the agency presumably will make the necessary policy choices and create a coherent and predictable regulatory scheme that explains to covered entities their obligations and liability. This Court should not permit the agency to promulgate regulations and then feel free years later to apply differing interpretations of these regulations without judicial review. Precluding the district court and Fourth Circuit from reviewing EPA's latest interpretation of the 1980 PSD Rule would do just that, thereby rewarding EPA for disregarding the plain language of both the statute and the 1980 PSD Rule.

B. Precluding Review of EPA's Litigation Position Does Not Serve Purposes of Expediency

Congress's other purpose in enacting Clean Air Act § 307(b) was to ensure that EPA's rules, standards, and final action are quickly reviewed by a single court intimately familiar with administrative procedures to settle any doubt about the validity of those actions. These purposes, however, are not served by precluding review of EPA's litigation interpretation of the 1980 PSD Rule.

As an initial matter, any argument suggesting Congress's preference for review in a court intimately familiar with administrative procedure (such as the D.C. Circuit) overreaches inasmuch as § 307(b)(1) does not discriminate among challenges that should have been filed in the D.C. Circuit and challenges that should have been filed in the regional circuits (which, presumably, are not as "intimately" familiar with administrative procedures).

Here, it is the EPA, not Duke Energy, that has impeded both the uniform and expeditious review of agency action by abruptly changing its contemporaneous interpretation of the 1980 PSD Rule many years later when it launched unexpected and unfair enforcement actions against Duke Energy and many other energy companies. Moreover, adjudicating Duke Energy's defense challenge would not entail an examination of administrative procedural defects, *i.e.*, the sufficiency of the record, whether the agency followed internal rules in the rulemaking process, or adequately explained its reasons for departing from the rule, all of which is the typical procedure that follows the filing of a petition for review of an EPA rule or standard. Rather, Duke Energy simply questions EPA's litigation position in

light of the plain language of the statute and regulation.

C. Precluding Review of EPA's Litigation Position Interpreting the 1980 PSD Rule Would Create Adverse Consequences That Congress Did Not Intend

As discussed, precluding review of Duke Energy's challenge to EPA's litigation interpretation of the 1980 PSD Rule would not serve any of Congress's intended purposes in enacting the rule. Moreover, it would have negative consequences for administrative and regulatory governance. In providing for an effective forum for pre-enforcement judicial review, Congress surely did not intend to induce the regulate community to file preemptive legal challenges to newly promulgated rules based upon how an agency might interpret or apply those rules sometime in the future. Such defensive petitions for review would needlessly proliferate lest the regulated entities fear being confronted with an enforcement action in which their defense would be precluded by the crabbed reading of § 307(b) that Petitioners advance. Indeed, a major purpose behind all statutes that provide for judicial review -- the conservation of judicial and litigation resources -- would not be served by adopting EPA's position.

The judicial review provisions of § 307(b) were designed to provide expedited review of the validity of the rule or final action in question, and to preclude their subsequent challenge years later in an enforcement action. But where, as here, the EPA has developed several inconsistent interpretations over the years of the meaning of its 1980 PSD Rule, Congress did not expect a regulated entity to file petitions for review in the D.C. Circuit. Such petitions would most assuredly be dismissed on the grounds

that there was no final action subject for review, or as unripe. Rather, because Congress provided district courts with the jurisdiction to adjudicate EPA enforcement actions, review of EPA's enforcement interpretation of the 1980 PSD Rule in those courts should not be precluded by § 307(b).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF CURRENT AND FORMER MEMBERS OF CONGRESS HENRY A. WAXMAN, EDWARD J. MARKEY, FRED ROONEY, ANDREW MAGUIRE, RICHARD OTTINGER, ANTHONY J. MOFFETT, AND WENDELL ANDERSON AS AMICUS CURIAE SUPPORTING THE PETITIONER

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Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 483 U.S. 723 (1987) 13

Pub. Employees Ret. Sys. v. Betts, 492 U.S. 158 (1989) 24

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United States v. Navajo Nation, 537 U.S. 488 (2003) 17

U.S. Airways v. Barnett, 535 U.S. 391 (2002) 17

FEDERAL STATUTES, RULES, AND REGULATIONS:

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42 U.S.C. § 7470 17

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42 U.S.C. § 7475(a) 6

42 U.S.C. § 7475(a)(1) 7

42 U.S.C. § 7475(a)(3) 7

42 U.S.C. § 7475(b) 9, 10

42 U.S.C. § 7475(e)(1) 16

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42 U.S.C. § 7511a(c)(4)(C)(8) 11
42 U.S.C. § 7949(2)(C) 4
40 C.F.R. § 51.166(b)(2) (1987) 4
40 C.F.R. § 51.166(b)(3) (1987) 4
40 C.F.R. § 51.166(b)(21) (1987) 4
40 C.F.R. § 60.14(b) (1987) 4
45 Fed. Reg. 52,675, 52,714 (Aug. 7, 1980) 4, 6

LEGISLATIVE HISTORY:

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136 Cong. Rec. S. 16895 (1990) 25
136 Cong. Rec. S. 17429 (1990) 24
H.R. Rep. No. 94-1175 (1976) 21, 22
H.R. Rep. No. 95-294 (1977) 12, 14
S. Rep. No. 95-127 (1977) 12, 15, 22

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OTHER:

Max Radin, *A Short Way With Statutes*, 56 Harv. L. Rev. 388 (1942) 24

Merriam-Webster's Collegiate Dictionary (10th ed. 1998) 5, 7

National Research Council, Interim Report of the Committee on Changes in New Source Review Programs for Statutory Sources of Air Pollutants, tbl. 3-3(b) (Nat'l Academies Press 2005) 22, 23

Ronald H. Rosenberg, *Cooperative Failure: An Analysis Of Intergovernmental Relationships And The Problem Of Air Quality Non-Attainment*, 1990 Ann. Surv. Am. L. 13, 25 20

Shi-Ling Hsu, *The Real Problem with New Source Review*, 26 Envt'l. L. Rep. 10098 (2006) 23

U.S. General Accounting Office, Emissions From Older Electricity Generating Units (2002) 23

INTEREST OF THE AMICI CURIAE[1]

Amici, current and former members of Congress who served on the committees that drafted the 1977 Clean Air Act ("CAA") Amendments establishing the Prevention of Significant Deterioration ("PSD") program, urge the Court to rule in favor of Petitioners and reject the Fourth Circuit's flawed reading of the statutory term "modification" as it applies to the PSD program. The Fourth Circuit's interpretation of that term would contravene Congress's intent as reflected in the statutory language and legislative history. As drafters, amici have a strong interest in ensuring that the letter and intent of the statute are interpreted correctly.

Henry A. Waxman serves as Congressman from California's 30th District, and has done so since 1974. Edward J. Markey serves as Congressman from Massachusetts' 7th District, and has done so since 1976. Fred Rooney served as Congressman from Pennsylvania's 11th District from 1967 to 1978. Andrew Maguire served as Congressman from New Jersey's 7th District from 1974 to 1980. Richard Ottinger served as Congressman from New York's 26th District from 1965 to 1971, its 25th District Congressman from 1975 to 1983, and its 20th District Congressman from 1983 to 1985. Anthony J. Moffett served as Congressman from Connecticut's 6th District from 1974 to 1982. Wendell Anderson served as Senator from Minnesota from 1976 to 1978. Each of the amici were

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[1] Amici state that no counsel for a party authored any part of this brief, and no person or entity other than Amici or their counsel and counsels' employers made a monetary contribution to the preparation or submission of this brief. The parties to the case have consented to the filing of this brief.

on the Senate's Environment and Public Works Committee and the House of Representatives' Interstate and Foreign Commerce Committee, respectively, during the passage of the Clean Air Act's 1977 amendments.

INTRODUCTION

In this Clean Air Act (CAA) case, the Fourth Circuit held that the Environmental Protection Agency's (EPA) "actual annual emissions" test for measuring emissions increases under the "Prevention of Significant Deterioration" (PSD) program was unlawful because it was not identical to the test EPA uses for its New Source Performance Program (NSPS). *United States v. Duke Energy Corp.*, 411 F.3d 539, 547 (4th Cir. 2005). Noting that the NSPS regulations utilize a maximum hourly emissions rate test, the Fourth Circuit concluded that EPA must also use this test to determine whether PSD applies to plant renovations such as those made to plants owned by Respondent Duke Energy. *See id.* at 550 ("EPA promulgated NSPS regulations that define the term 'modification' so that only a project that increases a plant's *hourly* rate of emissions constitutes a 'modification'. . . . EPA must, therefore, interpret its PSD regulations defining 'modification' congruently") (emphasis in original). Unlike the actual annual emissions test supported by EPA, the Fourth Circuit's hourly test would ignore emission increases caused by increased hours of operation made possible by renovations. Thus, if this ruling is allowed to stand, air pollution sources such as the aging coal-fired plants managed by Respondent could undertake renovations that increase the actual amount of emissions they produce

many times over without triggering PSD review. Such an approach to PSD applicability would do little or nothing to prevent significant deterioration of air quality – indeed, it would practically assure such deterioration. Amici, as legislators responsible for drafting the CAA Amendments of 1977, recognize that such a result would be inconsistent with the language and purpose of those provisions of the statute, as well as the statute's larger goal of controlling air pollution, and thus ask the Court to reverse the Fourth Circuit's decision.

ARGUMENT

I. The Actual Annual Emissions Increase Test in EPA's PSD Regulations Gives Effect to Congress's Unambiguous Intent to Determine PSD Applicability Based on the Actual Emissions Increase Resulting from a Physical or Operational Change.

A. The Plain Statutory Language Defines "Modification" in Terms of Whether a Change Will Increase Actual Emissions.

In crafting the CAA's Prevention of Significant Deterioration (PSD) requirements, Congress intended to guard against those changes to a stationary source that would increase the source's actual annual emissions. Accordingly, the interpretation offered by the industry respondents and the Fourth Circuit, which relies upon stationary source capacity – i.e., hourly emissions rates – rather than actual

annual emissions as required by EPA's PSD regulations,[2] contravenes Congress's unambiguous intent. *Cf. Chevron, USA, Inc. v. Natural Res. Defense Council*, 467 U.S. 837, 843 (1984) (rejecting even an agency interpretation when it contravenes Congress's unambiguous intent).

The CAA defines a regulated "modification" subject to PSD review as any physical or operational change in a stationary source which "increases the *amount* of any air pollutant *emitted* by such source[.]" 42 U.S.C. §§ 7411(a), 7949(2)(C) (emphasis added). This language unambiguously demonstrates Congress's intent for PSD applicability to turn on whether a change will increase actual emissions. *See New York v. Envtl. Prot. Agency*, 413 F.3d 3, 40 (D.C. Cir. 2005) ("*New York I*") ("[T]he plain language of the CAA indicates that Congress intended to apply NSR to changes that increase actual emissions instead of potential or allowable emissions."); *New York v. Envtl. Prot. Agency*, 443 F.3d 880, 889 (D.C. Cir. 2006) ("To the extent industry intervenors rely on the NSPS regime to reargue their position that 'modifications' require an increase in maximum emission rates, that issue was resolved in *New York I*."); *Alabama Power Co. v. Costle*, 636 F.2d 323, 353 (D.C. Cir. 1980) ("Plainly, the pollutants that sources 'emit' is a reference to some measure of *actual* emissions") (emphasis added); *id.* at 353 (rejecting an EPA interpretation of "potential to emit" that would make "the actual emissions

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[2] Compare the 1980 PSD Regulations, 45 Fed. Reg. 52,675, 52,714 (Aug. 7, 1980) (40 C.F.R. § 51.166(b)(2), (3), (21) (1987) (measuring "actual emissions" in terms of "tons per year") with the NSPS regulations referred to by the industry respondents, 40 C.F.R. § 60.14(b) (1987) (targeting "emissions rates" as measured in kilograms per hour).

calculation called for by the verb 'emit' [to] lose all significance").

The Fourth Circuit's "modification" test would ignore that clear intent by focusing on whether a change increases a source's maximum "hourly emissions rate" – which is a measure of whether a change would increase a source's emissions *capacity*, not of whether the change would cause actual emissions to increase. Specifically, the Fourth Circuit's maximum hourly test unlawfully ignores large actual emission increases from increased hours of operation made possible by a plant renovation. Indeed, increased hours of operation could cause a source's overall emissions to increase dramatically without increasing its hourly emissions rate. Congress expressly sought to avoid such an outcome by framing the CAA in terms of "amount[s] . . . emitted," 42 U.S.C. § 7411(a).

A straightforward analysis of the CAA's language demonstrates the difference between regulating amounts of emissions and regulating emissions rates. As defined by the *Merriam-Webster's Collegiate Dictionary*, "amount" is the "total number or quantity," and "emit" is "to throw or give off or out." *Merriam-Webster's Collegiate Dictionary* 39, 378 (10th ed. 1998). A program that regulates stationary sources by their hourly emissions rates alone would fail to regulate changes that cause a stationary source to "give off" increased quantities of pollutants. In sharp contrast, a program that regulates statutory sources by amounts of emissions, as does the actual annual emissions increase test in EPA's 1980 PSD regulations, would evaluate the actual quantity of pollutants given off by the stationary sources. *Cf. Alabama Power*, 636 F.2d at 353.

Unlike the Fourth Circuit's hourly emission rate test, the annual emissions increase test required under EPA's PSD regulations gives force to Congress's intent to regulate those changes that cause actual emission increases.[3] Accordingly, the Fourth Circuit's refusal to apply the regulatory annual emissions test – and its insistence that EPA must instead utilize a capacity-based hourly emissions rate test – should be rejected by the Court.

B. The Structure of the PSD Compliance Requirements Further Demonstrates Congress's Intent to Regulate Actual Emissions Increases.

Moreover, for the sake of the purpose of the PSD New Source Review (NSR),[4] Section 111(a)(4) must be held to require compliance for those changes to a stationary source that increase actual emissions. Under Section 165(a) of the Act, Congress set forth specific compliance procedures for "major emitting facilit[ies] constructed in any area to which this part applies. . . ." 42 U.S.C. § 7475(a). Section 165 requires that a facility seeking to undergo construction must obtain from EPA a permit "setting forth emissions limitations for such facility which

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[3] *See* 45 Fed. Reg. 52,675, 52,701 (seeking "as close a correspondence as possible" between the regulatory coverage of new and modified sources and their actual impacts on air quality and available PSD increment).

[4] The PSD program, along with the Nonattainment New Source Review (NNSR) program, collectively make up a broader program referred to as the New Source Review (NSR). While the NNSR program pertains to regions that fail to satisfy their National Ambient Air Quality Standards (NAAQS), 42 U.S.C. §§ 7505-7515, the PSD program pertains primarily to regions where the air quality levels satisfy the NAAQS.

conform to the requirements of this part." *Id.* § 7475(a)(1). In turn, Section 169(2)(C) of the PSD provisions states that the "term 'construction' when used in connection with any source or facility, includes the modification (as defined in Section 111(a)) of any source or facility." 42 U.S.C. § 7479(2)(C) (emphasis added). Section 165 also requires the owner or operator of such a facility to demonstrate

> that *emissions* from construction or operation of such facility will not *cause*, or contribute to, air pollution excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter;

Id. § 7475(a)(3).

Again, a plain language analysis demonstrates that Congress intended to allow the PSD program to regulate the actual emitted amount of air pollution resulting from a construction, rather than limit regulation to the hourly emissions rate desired by the industry respondents. As defined by the *Merriam-Webster's Collegiate Dictionary*, "emissions" is the "act of" "throw[ing] or giv[ing] off or out." *Merriam-Webster's Collegiate Dictionary* 378 (10th ed. 1998). "Cause," in turn, is defined as "to serve as a cause or occasion of," *id.* at 182, and "contribute" is defined as "to give or supply in common with others," *id.* at 252. Accordingly, a program that regulates statutory sources based on emissions caused by facility construction, as do EPA's 1980 PSD regulations, must be able to evaluate whether the proposed modification would give off or

supply excess actual pollutants in violation of 42 U.S.C. § 7503(a)(3).

In contrast, a program that is limited to regulating stationary source modifications solely by their hourly emissions rates, without also allowing regulation of actual emissions, would fail to control modifications from giving off increased quantities of pollutants. The PSD provisions account for emissions rates, but not without regard to other factors. For example, a proposed modification could operate for an increased number of hours each day in a manner that it could not absent the construction, thereby increasing its overall emissions under this regime without increasing its emissions rate. But Section 165 expressly seeks to avoid such loopholes by addressing "emissions" that would "cause, or contribute to," excess air pollution in violation of the PSD provisions, 42 U.S.C. § 7503(a)(3). Any attempt to restrict the PSD program from regulating actual increased quantities of pollutants should be rejected as contrary to the language of the CAA.

C. The Overall Structure of the Statute Also Emphasizes the Critical Role Of Actual Emissions in the New Source Review Process.

The emphasis that the statutory language places on actual emissions, as opposed to a source's emissions capacity (i.e., its maximum hourly emissions rate), is crucial to the larger context and purpose of the CAA's New Source Review (NSR) provisions, of which the PSD requirements are one part. Congress intended these NSR provisions to guard against increases that threaten to worsen ambient air quality. Indeed, Section 165 must be read in the context of other statutory provisions and the

purpose of the NSR program. *See Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 545-46 (2002) ("[I]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme" (citation and internal quotations omitted); *see also Gen'l Dynamics Land Sys. v. Cline*, 540 U.S. 581, 596 (2004) (applying "the cardinal rule that statutory language must be read in context since a phrase gathers meaning from the words around it") (internal quotations, brackets, and citation omitted); *Koons Buick Pontiac GMC v. Nigh*, 543 U.S. 50, 60 (2004) (stating that statutes are to be read in a "holistic" manner); *Chao v. Mallard Bay Drilling*, 534 U.S. 235, 245 n.9 (2002) (holding an interpretation that would leave "large gaps in the regulation of occupational health and safety" would be "plainly inconsistent with the purpose of the [Occupational Safety and Health] Act").

In addition to the plain language of CAA § 111(a)(4), as well as CAA § 165, numerous other statutory provisions demonstrate Congress's intent that the PSD program regulate any physical change that causes a facility to increase its actual emissions air pollution, regardless of whether the change also increases the facility's hourly emissions rates. *See* 42 U.S.C. §§ 7479(1), 7475(b), 751[illegible](c)(6). These provisions all address changes in terms of either actual amounts per year or total emissions, rather than the hourly emission rates measured by the Fourth Circuit's required test. For example, the CAA requires NSR under its PSD provisions prior to construction of any new source that emits, or has the potential to emit, more than the "tons per year" threshold applicable to that source category. *See* 42 U.S.C. § 7479(1). Specifically, the statute establishes a 100 ton per year threshold for

certain specified sources (including "fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input"), and a 250 ton per year threshold for all other sources. *Id.* In contrast, the respondents' hourly rates would authorize sources to proceed without review even when making changes that cause annual emission increases many times the amount that would have triggered NSR if the source were being built from scratch. Such an absurd result plainly contravenes Congress's intent.

Likewise, the statute exempts certain modifications from NSR's required air quality analysis under limited circumstances that include where a source limits its post-modification burden on air quality to "less than *fifty tons per year*" (emphasis added), 42 U.S.C. § 7475(b). Again, this statutory approach plainly demonstrates that Congress did not intend for EPA to utilize hourly emissions rates as a trigger for PSD.

The 1990 CAA amendments further emphasize Congress's long-standing understanding of NSR applicability as turning on whether a change will increase a source's actual annual emissions. For example, Section 182(c)(6), added to the Act in 1990, specifies a special de minimis rule for sources that emit volatile organic compounds, and couched that rule in terms of *tons per year increases*. Specifically, this new statutory provision states:

> The new source review provisions under this part shall ensure that increased emissions of volatile organic compounds resulting from any physical change in, or change in the method of operation of, a stationary source located in the [serious nonattainment] area shall not be considered de

> minimis for purposes of determining the applicability of the permit requirements established by this chapter unless the increase in net emissions of such air pollutant from such source does not exceed 25 tons when aggregated with all other net increases in emissions from the source over any period of 5 consecutive calendar years which includes the calendar year in which such increase occurred.

42 U.S.C. § 7511a(c)(6). Immediately following that provision, another provision creates a "special rule for modifications of sources emitting less than 100 tons," which applies whenever such a source makes a change "except for a de minimis increase" as established in Section 182(c)(6). *See* 42 U.S.C. § 7511a(c)(4)(C)(7). Thus, the applicability of this provision depends on whether a change would lead to more than a de minimis increase, which Section 182(c)(6) defines in terms of the annual tonnage increase resulting from a planned change. *See* 42 U.S.C. § 7511a(c)(4)(C)(6). The same is true for Section 182(c)(8), which establishes a "special rule for modifications of sources emitting 100 tons or more." *See* 42 U.S.C. § 7511a(c)(4)(C)(8). These provisions are part of the statutory context and thus are relevant to interpretation of congressional intent, and confirm that the CAA focuses the NSR on annual actual emissions, not a source's hourly emissions rate.

II. The Purpose of the PSD Amendments Would Be Frustrated If the Act Is Interpreted to Limit PSD Review to Those Changes that Increase a Facility's Hourly Emissions Rate.

Congress's declaration of purposes for the PSD program – included in the statute itself – state that the program was designed "to protect public health and

welfare from any *actual or potential adverse effect* which in the Administrator's judgment may reasonably be anticipate[d] to occur from air pollution. . . ." *See* 42 U.S.C. § 7470(1) (emphasis added). It also states that the program is intended to "assure that *any decision to permit increased air pollution* in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process." *See* 42 U.S.C. § 7470(5) (emphasis added).

These statutory goals, which speak in terms of controlling "actual" air pollution, and "increases" in the same, are inconsistent with an hourly rate test that would ignore actual emission increases that threaten public health and the environment and degrade air quality.

Furthermore, the 1977 legislative history makes it clear that Congress did not intend to permit aging sources, whatever their hourly emissions rate, to take up all the allowable amounts of pollution available to clean air areas, limiting the ability to develop new industrial plants. As the Senate explained in 1977, "[t]he chief tool to be used in implementing the no significant deterioration requirements is the permit that must be issued by the State for any major emitting facility to be located in any clean-air area, including Federal lands." S. Rep. No. 95-127, at 32 (1977). *See also* H.R. Rep. No. 95-294, at 9 (1977) ("The purpose of the [PSD] permit is to assure that the allowable increments and allowable ceilings will not be exceeded as a result of emissions from any new or modified major stationary source."). Use of the legislative history to discern Congressional intent is particularly appropriate in the case of the complex Clean Air Act, as this Court has

recognized. It has looked to the legislative history to determine Congressional intent under the Act in, by our count, in fourteen of the twenty most recent cases in which the Court has interpreted the Act. *See, e.g., Pennsylvania v. Del. Valley Citizens' Council for Clean Air*, 483 U.S. 711, 723 (1987) (considering factors endorsed by Congress); *Chevron*, 467 U.S. at 851 (looking to the legislative history to determine Congressional intent); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 683 (1983) (using legislative history to establish Congress's designation of discretionary authority); *Harrison v. PPG Indus.*, 446 U.S. 578, 589-590 (1980) (declining to adopt a statutory interpretation based on a lack of support in the legislative history); *see generally League of United Latin American Citizens v. Perry* ___ S.Ct. ___, 2006 WL 1749637 (June 28, 2006) (Kennedy, J.) (turning to "the legislative history [of the Voting Rights Act] identifies factors that courts can use . . . in interpreting" the meaning of a section of the statute).[5]

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[5] The D.C. Circuit has acted similarly. Between 1995 and the present, the D.C. Circuit has turned to the legislative history to understand Congressional intent in ten out of fourteen cases (71.4%) involving Clean Air Act rulemaking. *See New York*, 443 F.3d at 885 (finding that legislative history did not support an expansive meaning of the word "any"); *Ctr. for Energy & Econ. Dev. v. Envtl. Prot. Agency*, 398 F.3d 653, 660 (D.C. Cir. 2005) (finding that all the legislative history references pertain to § 169A and Congress's addition of § 169B clarified that the focus of the Clean Air Act was to achieve "actual progress and improvement in visibility."); *Nat'l Wildlife Fed'n v. Browner*, 237 F.3d 670, 675 (D.C. Cir. 2001) (finding that the legislative history suggested that Clean Air Act § 509(b)(1) was a venue provision, not jurisdiction provision); *George E. Warren Corp. v. U.S. Envt'l. Prot. Agency*, 159 F.3d 616, 623 (D.C. Cir. 1998) (using the congressional record to establish that the Clean Air Act "reflects a legislative compromise between two potentially conflicting goals – avoiding degradation of air quality and not disrupting the market for conventional gasoline."); *Clean Air Implementation Project v. Envt'l. Prot. Agency*,

(Continued on following page)

The legislative history further demonstrates that Congress intended for the PSD program to promote economic growth by ensuring that existing sources, if modified, would not consume all available PSD increment, thereby preventing new sources from constructing in an area. As the Senate explained:

> In the long run, the growth potential of these clean-air areas may be quickly filled without a reasonable policy to prevent significant deterioration. The first new source built in an area would often absorb the entire available air resource, leaving no capacity for future expansion or growth. Under the policy to prevent significant deterioration in this bill, the growth options should be enlarged. This is because the provision requires that any major source be constructed to utilize the best available control technology. This should usually leave room for additional growth.

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150 F.3d 1200, 1202 (D.C. Cir. 1998) ("Section 113 deals with federal enforcement of emission standards and, according to its legislative history, was amended to enhance EPA's enforcement powers."); *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 463 (D.C. Cir. 1998) (finding that the House Report shows that Congress intended to give California the broadest possible discretion to select the best means to protect its citizens); *Texas Mun. Power Agency v. EPA*, 89 F.3d 858, 867 (D.C. Cir. 1996) (noting House Report No. 294 described Clean Air Act § 307(b)(1) as a venue provision); *EDF, Inc. v. EPA*, 82 F.3d 451, 463 (D.C. Cir. 1996) (looking to see if the legislative history of the statute could provide guidance on general conformity rule, on finding it didn't, turning to the language of the statute) *Nat'l Res. Def. Council v. Browner*, 57 F.3d 1122, 1128 n.8 (D.C. Cir. 1995) (finding the legislative history contrary to the NRDC statutory interpretation.).

S. Rep. No. 95-127, at 31 (1977). The Senate Committee explained that it should be up to the community where a source proposed to construct to decide whether to allow the source to increase emissions such that increment is consumed. Specifically, the Senate Report states:

> This directive enables the State to consider the size of the plant, the increment of air quality which will be absorbed by any particular major emitting facility, and such other considerations as anticipated and desired economic growth for the area. This allows the States and local communities to judge how much of the defined increment of significant deterioration will be devoted to any major emitting facility. If, under the design which a major facility proposes, the percentage of the increment would effectively prevent growth after the proposed major facility was completed, the State or community could refuse to permit construction, or limit its size. This is strictly a State or local decision: this legislation provides the parameters for that decision.

S. Rep. No. 95-127, at 31 (1977).

But under the Fourth Circuit's rule, these sorts of determinations by the states would be impossible in jurisdictions where emissions-increasing changes to old sources proceed without NSR review, thus using up all the states' available increment, and preventing new, economically desirable and environmentally efficient sources from coming on line. Congress plainly did not intend such an outcome.

Related statutory provisions detailing what a source must demonstrate as a prerequisite to obtaining a PSD permit further emphasize the ambient air quality focus of the NSR program.

For example, the statute elsewhere requires permit applicants to measure their air pollution from their source *on an annual basis*. It requires the owner or operator of a proposed new source or modification to demonstrate that emissions will not "cause, or contribute to" a significant increase in air pollution beyond the "baseline concentration of such pollutants." *See* 42 U.S.C. § 7474(a)(2)(B). "Baseline concentration" is defined as "the *ambient concentration levels* which exist at the time of the first application for a permit in an area subject to this part." 42 U.S.C. § 7479(4) (emphasis added).

The statute further provides that issuance of a permit "shall be preceded by an analysis . . . *of the ambient air quality* at the proposed site and in areas which may be affected by emissions from such facility for each pollutant subject to regulation under this chapter which will be emitted from such facility." 42 U.S.C. § 7475(e)(1) (emphasis added). That analysis "shall *include continuous air quality monitoring data* gathered for purposes of determining whether emissions from such facility will exceed the maximum allowable increases or the maximum allowable concentration permitted under this part." 42 U.S.C. § 7475(e)(2) (emphasis added). The Act specifies that the monitoring data should be "gathered over a period *of one calendar year preceding the date of application for a permit.*" *Id.* (emphasis added).

III. The Respondents' Reading of "Modification" Would Frustrate the Policies of the Clean Air Act.

A. The Actual Annual Emissions Test in EPA's PSD Regulations is Needed to Effectuate the Objective of the PSD Program.

Regulation of those changes that cause a stationary source to increase its actual annual emissions, rather than only those changes that increase hourly emissions rates, is necessary to accomplish the objectives of the PSD program set forth by Congress. Statutes should not be interpreted in ways that would thwart their objectives. *See U.S. Airways v. Barnett*, 535 U.S. 391, 397 (2002) (rejecting a reading under which statutory provision "could not accomplish its intended objective"); *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 n.6 (2003) (rejecting an interpretation that would "thwart the statute's object"); *United States v. Navajo Nation*, 537 U.S. 488, 508 (2003) (rejecting a reading that was "out of line with one of the statute's principal purposes"). Congress focused Section 111(a) on whether a modification would cause increases in the amount of air pollution emitted by a source and Section 165 on whether new construction on a major emitting facility would lead the facility to cause, or contribute to excess air pollution. 42 U.S.C. §§ 7411(a), 7503(a)(3). Moreover, Congress created the PSD program to prevent such increases from significantly deteriorating air quality. *See* 42 U.S.C. § 7470 (listing five statutory purposes of the PSD program, each of which includes air quality, *see infra* Section III.B.). But under the Fourth Circuit's test, a source could greatly increase its actual emissions of harmful air pollutants through construction that would allow increased hours of operation, so long as that

construction does not change the emitting unit's capacity to emit.

These Congressional objectives for the PSD program cannot be accomplished through the hourly emissions rate test desired by the industry respondents. As lower courts faced with applying the PSD provisions have noted, the PSD program "focuses on where the plant will be located and its potential effect on the environs," *Citizens for Clean Air v. Envt'l. Prot. Agency*, 959 F.3d 839, 849 (9th Cir. 1992). Indeed, the PSD program demands a site-specific review of whether a proposed major source will contribute to a significant degradation of local air quality despite compliance with the NSPS. *See* 42 U.S.C. § 7470(1). Accordingly, the PSD program addresses changes to stationary sources in terms of actual amounts rather than hourly rates in order to prohibit changes to stationary sources that will lead to larger potential effect on the environs, through increased rates, longer hours of operations, or any other changes that may contribute to a significant degradation of local air quality.

B. The Purpose of the Nonattainment New Source Review Provisions of the Statute Would Also Be Thwarted If the Act Was Interpreted to Permit Measurement of Pollution Through an Hourly, Instead of Actual Annual Emissions Rates.

In addition to being inconsistent with the PSD program, the hourly test embraced by the Fourth Circuit is inconsistent with the statute's nonattainment new source

review provisions.[6] The nonattainment portions of the Act depend upon the ability of states to adopt pollution control strategies that focus on annual emissions. The hourly emissions rate test adopted by the Fourth Circuit threatens to crowd these actual-emissions-based state plans out, upsetting the balance in the federal-state relationship that is crucial to the operation of the Act.

The Act requires each State to include a nonattainment New Source Review permit program in its plan to implement the NAAQS. *See* 42 U.S.C. § 7410(a)(C) (plans must include "regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program" including permitting requirements for sources in nonattainment areas).

The adoption of these "State Implementation Plans" requires the establishment of attainment inventories, with enforceable plans approved to meet those inventories. Attainment inventories catalogue criteria pollutants in terms of actual emissions in tons per year. *See* 42 U.S.C. §§ 7502(c)(3)-(4) (SIPs must include a "comprehensive, accurate, current inventory of actual emissions from all sources"). Reliance on hourly capacity-based tests would allow significant increases in actual, annual emissions to escape NSR controls. As states have noted, these increases under a potentials-based test will disrupt their attainment and maintenance effort.

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[6] Those provisions are applicable to areas that are violating the National Ambient Air Quality Standards (NAAQS).

The balance between state and federal control struck in the Act is an important one, and one that Congress carefully struck in the 1977 Amendments. *See* Ronald H. Rosenberg, *Cooperative Failure: An Analysis Of Intergovernmental Relationships And The Problem Of Air Quality Non-Attainment*, 1990 Ann. Surv. Am. L. 13, 25 (describing the 1977 Amendments as consistent with a "general pattern of state planning and federal supervision"). The Act is founded on principles of cooperative federalism, and the Fourth Circuit's rule would upset that balance. *See Duke Energy Corp.*, 411 F.3d at 550 (finding that the EPA must interpret the term "modification" congruently for use in the NSPS and PSD programs); *see also Stewart v. Abend*, 495 U.S. 207, 230 (1990) ("[I]t is not our role to alter the delicate balance Congress has labored to achieve.").

Other aspects of the part of the Act designed to apply to especially polluted states make clear that the 1977 Amendments were designed to curtail, rather than ignore, those emission increases that could negatively impact ambient air quality. Specifically, in addition to controlling emissions to the "lowest achievable emissions rate," 42 U.S.C. § 7503(a)(2), the permit applicant must, among other things:

- obtain "sufficient offsetting emissions reductions . . . such that total allowable emissions from existing sources in the region . . . will be sufficiently less than total emissions from existing sources . . . prior to the application for such permit . . . so as to represent . . . reasonable further progress" in attaining NAAQS compliance. 42 U.S.C. § 7503(a)(1)(A). Such offsets "shall assure that the total tonnage of increased emissions of the air pollutant from the new or modified source shall be offset by an equal or greater reduction, as applicable, in the actual emissions of such air pollutant from the

same or other sources in the area." 42 U.S.C. § 7503(c)(1); and

- undertake "an analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source [that] demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification." 42 U.S.C. § 7503(a)(5).

The nonattainment NSR provisions in these ways turn on actual emissions, instead of hourly rates. But the Fourth Circuit's rule would make hourly rates the currency in NSR. Such a conclusion is impossible to square with the way the nonattainment NSR portions of the statute address emissions – on an actual, annual basis.

C. The Fourth Circuit's Rule Would Lengthen the Lives of Old, High-Pollution Sources Contrary to Congress's Intent.

The use of the hourly rate would encourage the continued use of outdated, older, "grandfathered" facilities operating with little or no air pollution control well into the future. As the Act's legislative history demonstrates, however, Congress's decision to allow these sources to continue operating without NSR controls was based on the expectation that many "older units fac[e] retirement in 10-15 years," meaning that they would have to be refurbished – and controlled – if they were to continue operating. *See* H.R. Rep. No. 94-1175, at 159 (1976). In recognition of this congressional intent, *Alabama Power* held that "[t]he statutory scheme intends to 'grandfather' existing industries; but the provisions concerning modifications indicate that this is not to constitute a perpetual immunity from all

standards under the PSD program." 636 F.2d at 400; *see also New York I*, 413 F.3d at 27 (same).

Perpetual immunity – the practical consequence of the Fourth Circuit's rule – is the opposite of what Congress intended. For example, while the 1977 House report acknowledged that for "some of the older and smaller sources, it is not physically or economically feasible to retrofit" pollution controls, it also noted that those sources were exactly the sort of sources with limited useful lives and short futures. *See, e.g.*, H.R. Rep. No. 94-1175, at 159 (1976) ("[I]t is imprudent to backfit FGD [a control technology] into existing plants, especially older units facing retirement within 10-15 years.") *See also* S. Rep. No. 95-127, at 128 (1977) ("There are in the United States approximately 200 old coal-fired power plants over 20 years of age. . . . Most will be totally phased out of operation in the next 5 to 20 years.") (additional views of Sen. Baker).

A perpetual immunity for old, high-emitting plants, is unlikely to result in cleaner air. Indeed, permitting older plants to be run harder and longer at the same generous hourly emissions rates that they have been operating under since the advent of the Act would circumvent its purpose. Per megawatt hour (MWh) of electricity produced, coal-fired plants built before 1950 emitted an average of 20.58 pounds of sulfur dioxide per MWh of electricity produced, while coal-fired power plants built after 1999 emitted only 3.88 pounds.[7] The average nitrogen oxide emission rate for pre-1950 plants was 5.51

[7] National Research Council, Interim Report of the Committee on Changes in New Source Review Programs for Statutory Sources of Air Pollutants, tbl. 3-3(b) (Nat'l Academies Press 2005), available at www.nap.edu/books/0309095786/html.

pounds per MWh, while for post-1990 plants the rate was 3.51.[8] Permitting these plants to operate forever at their high emission rates retards capital turnover; 57% of all power plants in the United States were built before 1972, while 35% are more than 50 years old.[9]

Congress considered and rejected expanding the scope of grandfathering in the 1990 Amendments to the Clean Air Act. During the debate on what kind of emissions controls to impose on older plants, Senator Chafee, the Ranking Member of the Senate Environmental and Public Works Committee and floor manager for the 1990 CAA revisions, observed: "The rationale that is behind permitting these old plants to emit is first of all, they are inefficient, and at some point they are so inefficient they are going to be replaced. And there you come in with a new plant and a clean plant." 136 Cong. Rec. S. 3717, 3726 (1990), *reprinted in* Legislative History of the Clean Air Act Amendments of 1990, at 6946, 6970 (1993) (statement of Sen. Chaffee, Senate Debate on S. 1630). "A [floor] statement of one of the legislation's sponsors . . . deserves to be accorded substantial weight in interpreting the statute." *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).[10]

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[8] *Id.* at 81, tbl. 3-3a. Accordingly, "a bias towards older capital is a bias against better pollution control equipment and a perpetuation of pollution externalities." Shi-Ling Hsu, *The Real Problem with New Source Review*, 26 Envtl. L. Rep. 10098 (2006).

[9] U.S. General Accounting Office, Emissions From Older Electricity Generating Units 2 (2002).

[10] *See also American Trucking Ass'n, Inc. v. ICC*, 697 F.2d 1146, 1149 (D.C. Cir. 1983) (Scalia, J.) (relying on floor statements as part of the relevant legislative history of a statute); *Southeast Shipyard Ass'n v. United States*, 979 F.2d 1541, 1546 (D.C. Cir. 1992). Sponsor statements

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However, "[t]he flaw," Chafee explained, is that "we are not seeing the end of these plants. We are not seeing them go either out or to be reused in a very reduced fashion." *Id.* Congress accordingly rejected attempts to relax the new source review process; now the Fourth Circuit has done what Congress eschewed in 1990.

In fact, several Senators wrote to Conference Committee Chair Senator Baucus specifically urging the adoption of a rule that would "[a]llow utilities to undertake needed repairs at an existing unit without triggering an obligation to meet stringent new source performance standards." 136 Cong. Rec. S. 17429, 17429 (1990), *reprinted in* Legislative History of the Clean Air Act Amendments of 1990, at 731, 1087 (1993). The Conference Agreement version of S. 1630, however, omitted such a change. Senator Mitchell, speaking during the Conference Report floor debate, explained why:

> In 1970, the Clean Air Act required that new sources meet tight emission standards. At that time, it was assumed that electric utility units had an average lifetime of 30 years. But many utilities are now choosing to extend the life of their plants rather than meet the new source

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"greatly aid in making the [statute's] purpose apparent." Max Radin, *A Short Way With Statutes*, 56 Harv. L. Rev. 388, 411 (1942); *see also Pub. Employees Ret. Sys. v. Betts*, 492 U.S. 158, 179 (1989) (giving weight to Senator Yarborough's views on the construction of the Age Discrimination in Employment Act because he was a sponsor). *See also Pacific Gas & Elec. Co. v. Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 220 n.23 (1983) (relying on a 1965 explanation by "an important figure in the drafting of the 1954 [Atomic Energy] Act"); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 582 (1998) (sponsors' statements); *Conroy v. Aniskoff*, 507 U.S. 511, 516-7 & n.12 (1993) (sponsors' statements).

> performance standards mandated under current law. This development has exacerbated our pollution problems and made national acid rain controls even more necessary. Some approaches . . . would again shield utilities from meeting new source standards – and postponing needed emission reductions – even though such utilities may in essence be rebuilding their units.

136 Cong. Rec. S. 16895, 16904 (1990), *reprinted in* Legislative History of the Clean Air Act Amendments of 1990, at 731, 791 (1993).

The 1990 debate provides more evidence that Congress knew that the older plants would provide more than their share of pollution for the remainder of their lives. However, Congress clearly expected that the end of those lives would not be far away. Permitting plants to enjoy the benefit of old-plant emissions standards with entirely new plant equipment would not be consistent with Congress's intent in establishing the PSD and nonattainment NSR programs.

CONCLUSION

For the foregoing reasons, the Court should reverse the Fourth Circuit's decision.

Respectfully submitted,

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